THE ROLE OF ATTORNEY SPEECH AND ADVOCACY IN THE SUBVERSION AND PROTECTION OF CONSTITUTIONAL GOVERNANCE

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"Lawyers, I have nothing but lawyers that stop me on everything."
–Donald J. Trump, December 18, 2020[1]

In January 2019, the Annual Meeting Program of the Professional Responsibility Section of the Association of American Law Schools addressed *The Ethics of Lawyers in Government*.[2] I moderated that program.

* Professor of Law, Indiana University Robert H. McKinney School of Law. I would like to thank the other participants at the *After the Trump Administration: Lessons and Legacy for the Legal Profession* symposium workshop, held on November 12, 2021, who provided comments and insights, including Susan Saab Fortney, Bruce Green, Peter Joy, Leslie Levin, Kevin McMunigal, Veronica Root Martinez, Richard Painter, Rebecca Roiphe, and Maybell Romero. I would also like to thank Florence Roisman and Nicholas Georgakopoulos for providing helpful comments.

1. As reported in BOB WOODWARD & ROBERT COSTA, PERIL 194 (2021). According to Woodward and Costa, Trump then said, "I'm very embarrassed by my lawyers and the Justice Department." *Id.* The facts underlying the storming of the Capitol on January 6, 2021, and the activities of former President Trump and his allies to overturn the 2020 election are still being investigated. I have primarily relied on court cases and congressional reports in this paper, with appropriate citations. In the places I have relied on Woodward and Costa's book, *Peril*, which is journalism rather than testimony, I state as much. Notably, the authors of *Peril* explain that Trump himself declined to be interviewed for the book, and further:

> The book is drawn from hundreds of hours of interviews with more than 200 firsthand participants and witnesses to these events. Nearly all allowed us to tape-record our interviews. When we have attributed exact quotations, thoughts, or conclusions to the participants, that information came from the person, a colleague with direct knowledge, or from government or personal documents, calendars, diaries, emails, meeting notes, transcripts, and other records.

Id. at 419.

2. On January 3, 2019, the AALS Professional Responsibility Section held its annual program on the topic, *The Ethics of Lawyers in Government*, in New Orleans, Louisiana. I served as the Chair of the Professional Responsibility Section and moderated the program. Speakers included some of the foremost authorities on ethics in government and the role of government lawyers: Richard Painter, Kathleen Clark, Rebecca Roiphe, Melissa Mortazavi, and Ellen Yaroshefsky. Kathleen Clark's paper from the program was published in the *Indiana Law Review*, along with my introduction. The papers presented at the program by Rebecca Roiphe and Melissa Mortazavi were published in the *Fordham Law Review*.

At the time, President Trump and his administration—including some lawyers in that administration—had engaged in actions that were disconcerting and unethical. Presenters discussed President Trump's circumvention of the Emoluments Clause and statutory restrictions on nepotism in appointments, as well as the distressing but concomitant actions of the Department of Justice (DOJ) under President Trump, aligning with him as though they were his personal attorneys on these issues rather than providing neutral advice as lawyers representing the impartial interests of the United States.[3] As troubling as these issues appeared, they now seem faint. After January 6, 2021, we were no longer attempting to rein in a president who enriched his family with appointments and himself with gifts from foreign powers, but with a president who wanted to undermine our entire system of government. A president who did not want to leave office after being voted out. A president who refused to concede defeat or to agree to a peaceful transfer of power. A president who wanted to stay in power without regard to the will of the people. Which leaves us with the problem of how to rein in and restrict a president who stands against our country's basic foundational principle: that "We, the People of the United States," hold the ultimate political power and sovereignty. President Trump tried to wrest that power and sovereignty for himself.

Unfortunately, Trump's bid for autocracy received substantial public backing from lawyers. Rudy Giuliani, Sidney Powell, Jenna Ellis, L. Lin Wood, John Eastman, and John Clark headlined the legal spectacle shoring up Trump's claims to power—to the courts, to the public, and, very problematically, to Trump himself.

But not all lawyers close to Trump's power grab for the sovereignty and soul of the United States were villains. Indeed, we likely owe the fact that we currently still live in a constitutional democracy to lawyers, including Attorney General Bill Barr; Acting Attorney General Jeff Rosen; the DOJ lawyers who threatened to resign en masse if Trump went through with his plan to try to install a new Attorney General who would keep him in power; attorney Christopher Krebs who, as the Director of the Cybersecurity and Infrastructure Security Agency in the United States, Department of

3. *See* Margaret Tarkington, *Introduction: The Ethics of Lawyers in Government*, 52 IND. L. REV. 265 (2019) (summarizing presentations from the Professional Responsibility Section Annual Meeting Program for 2019, *The Ethics of Lawyers in Government*); Kathleen Clark, *The Lawyers Who Mistook a President for Their Client*, 52 IND. L. REV. 271, 291 (2019).

Homeland Security, certified that it was a secure and safe election; the numerous lawyers who resigned rather than bring lawsuits that were frivolous or fraudulent; state and federal judges (including Republican and even Trump appointees) who heard and dismissed scores of election fraud cases (including the U.S. Supreme Court); and Mike Pence, who has a law license and chose to complete his constitutional duty as Vice President and count the certified electoral votes rather than use some ploy to declare Trump the victor, despite intense pressure from Trump, Eastman, and others.

But the lawyer villains were a serious problem—and their speech and advocacy has given and, unfortunately, continues to give Trump supporters a mirage of credence to Trump's Big Lie that the election was stolen from him. Some courts have imposed sanctions against these lawyers,[4] and some lawyers have been referred to state disciplinary authorities.[5] Rudy Giuliani was even given an interim suspension from the practice of law pending the resolution of his grievance case because the New York Appellate Division found Giuliani posed an imminent threat to the public interest.[6]

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4. *E.g.*, King v. Whitmer, No. 20-13134, 2021 WL 3771875, at *41–42 (E.D. Mich. Aug. 25, 2021) (imposing sanctions on Sidney Powell, Scott Hagerstrom, Gregory J. Rohl, Emily P. Newman, Julia Z. Haller, L. Lin Wood, Howard Kleinhendler, and Brandon Johnson under FED. R. CIV. P. 11, 28 U.S.C. § 1927, and the court's inherent authority), *stay granted in part*, No. 20-13134, 2021 WL 5711102 (E.D. Mich. Dec. 2, 2021) (calculating and staying monetary sanctions pending appeal), *appeal docketed*, No. 22-1010 (6th Cir. Jan. 5, 2022), *and stay denied in part*, No. 22-1010 (6th Cir. Feb. 24, 2022) (declining to stay nonmonetary sanctions); O'Rourke v. Dominion Voting Sys., Inc., No. 20-cv-03747, 2021 WL 3400671, at *31–33 (D. Colo. Aug. 3, 2021) (imposing sanctions on attorneys Gary D. Fielder and Ernest John Walker), *modified*, No. 20-cv-03747, 2021 WL 5548129 (D. Colo. Oct. 5, 2021), *appeal docketed*, No. 21-1442 (10th Cir. Dec. 23, 2021); *see also* Joey Bunch, *Federal Judge Tells Lawyers to Pay Up in Dominion Voter Fraud Case*, COLO. POL. (Nov. 27, 2021), https://www.coloradopolitics.com/courts/federal-judge-tells-lawyers-to-pay-up-in-dominion-voter-fraud-case/article_cdad92ee-4c0a-11ec-8359-f3aa5a763f47.html [https://perma.cc/C5FZ-DA93] (reporting sanctions against Fielder and Walker).

5. *E.g.*, *King*, 2021 WL 3771875, at *41 (referring the sanctioned attorneys to their respective disciplinary authorities "for investigation and possible suspension or disbarment"); Wis. Voters Alliance v. Pence, No. 20-3791, 2021 WL 686359, at *4 (D.D.C. Feb. 19, 2021) (referring Erick G. Kaardal to the Committee on Grievances), *argued sub nom.* Wis. Voters Alliance v. Harris, No. 21-5056 (D.C. Cir. Dec. 2, 2021); Letter from Donald Ayer et al. to Hamilton P. Fox, III, Off. of Disciplinary Couns., D.C. Ct. App. (Oct. 5, 2021), https://ldad.org/wp-content/uploads/2021/10/DC-Ethics-Complaint-Against-Jeffrey-Clark.pdf [https://perma.cc/AH95-JGRM] (referring Jeffrey B. Clark to the District of Columbia Bar); Letter from Stephen Bundy, Prof. Emeritus, Univ. of Cal., Berkeley, to George S. Cardona, Chief Trial Couns., State Bar of Cal. (Oct. 4, 2021), https://statesuniteddemocracy.org/wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf [https://perma.cc/R5LJ-HBE5] (referring John C. Eastman to California State Bar).

6. *See In re* Giuliani, 146 N.Y.S.3d 266, 283–84 (App. Div. 2021).

Some of these lawyers have raised (and others likely will raise) the First Amendment as a defense to any discipline as to their speech regarding Trump and the election or their advocacy both in and out of court that the 2020 election was stolen. So far, the courts that have considered this defense have given it very short shrift. Too short, in fact. In accordance with a general trend to discount lawyer First Amendment rights,[7] courts have indicated briefly that lawyers simply don't have the same First Amendment rights as the public and perhaps none at all in the courtroom.[8] These assertions are wrong. Although the courts' ultimate conclusion is correct that the First Amendment does not protect these buffoons in their speech and advocacy for Trump and the Big Lie, it is not because lawyers don't enjoy First Amendment protection. Instead, it is because the First Amendment rights of lawyers are tied to the lawyer's role in the justice system. Lawyers must, and do, have First Amendment rights of speech, advocacy, and petitioning.

Further, the acts of the unlikely heroes of the story—including allies of Trump such as Bill Barr and Mike Pence—also highlight the First Amendment rights of lawyers in general, and those in government service or who advise government officials in particular. The entire picture of lawyer involvement also highlights the need for greater clarification and even amended rules of professional conduct to address the obligations of government lawyers and private lawyers who advise or assist government officials in the use of government power.

In this Article, I will explore the First Amendment rights of lawyers in the context of Trump's Big Lie that the election was stolen and his bid for an autocratic takeover. Attorneys who have advised and assisted in Trump's

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7. *See* Margaret Tarkington, *Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward*, 95 ST. JOHN'S L. REV. 121 (2022).

8. *See, e.g.*, *King*, 2021 WL 3771875, at *1 n.2 ("[I]n filing motions and advocating for his client in court, [an attorney is] not engaged in free expression; he [is] simply doing his job. In that narrow capacity, he voluntarily accept[s] almost unconditional restraints on his personal speech rights. . . . For these reasons, . . . in the context of the courtroom proceedings, an attorney retains no personal First Amendment rights." (alterations in original) (quoting Mezibov v. Allen, 411 F.3d 712, 717, 720–21 (6th Cir. 2005))). Rudy Giuliani relied on the First Amendment to object to all discipline against him, but the court noted that "speech by an attorney is subject to greater regulation than speech by others." *Giuliani*, 146 N.Y.S.3d at 270 (quoting Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991)). The court concluded—without any analysis of the First Amendment or its application to the to specific discipline at issue—that "[w]hile there are limits on the extent to which a lawyer's right of free speech may be circumscribed, these limits are not implicated by the circumstances of the knowing misconduct that this Court relies upon in granting interim suspension in this case." *Id.*

Big Lie are raising the First Amendment as a defense to sanctions and discipline. The appropriate response to that defense is not to assert (as courts thus far are doing) that attorneys lack First Amendment rights, but rather to recognize that those rights, while essential, are attuned to the role of attorneys in the justice system. So attuned, attorneys lack First Amendment rights to speech, association (meaning they may be required to refuse representation or withdraw), petitioning, and public advocacy that undermine the system of justice, the rule of law, or—as relevant in the context of overturning the 2020 election—constitutional governance. Yet the First Amendment should protect attorneys for Trump who filed nonfrivolous suits. It protects attorneys who represented Trump but refused to assist in illegal or fraudulent activities. It protects attorneys who made public statements but avoided false and misleading statements and whose statements did not assist in the fraud of Trump's Big Lie. Yet Trump-supporting attorneys should find themselves bereft of a First Amendment defense—not when their views are unpopular or even wrong—but when and to the extent that they are using the state power delegated to them to practice law to thwart the justice system or undermine constitutional governance.

I will start by providing an overview of the principles surrounding lawyer First Amendment rights, and then I will examine those principles in several specific contexts that were highlighted by Trump's grab for power, namely: (1) advice to clients, (2) filing of lawsuits and evidence in court, (2) pretrial publicity and non-court hearings, (3) incitement at the January 6 "Save America" rally, and (4) obligations to report up, report out, or resign.

I. BASIC PRINCIPLES REGARDING LAWYER FIRST AMENDMENT RIGHTS

Thus far in response to sanctions and discipline based on assisting in Trump's Big Lie, lawyer assertions of First Amendment rights as a defense have fallen flat, and rightly so. However, the courts' approach to lawyer First Amendment rights fails to appropriately recognize that lawyers in fact have protectable First Amendment rights. Instead, courts simply cite to dicta in *Gentile v. State Bar of Nevada* for the proposition that lawyers' First Amendment rights are extremely limited and, in the courtroom, may even be nonexistent. For example, in *King v. Whitmer*, the U.S. District Court, when sanctioning Powell, Wood, and others, determined that "[i]n filing

motions and advocating for his client in court, [an attorney is] not engaged in free expression" and "voluntarily accept[s] almost unconditional restraints on his personal speech rights"—thus "in the context of the courtroom proceedings, an attorney retains no personal First Amendment rights."[9] Similarly, the Appellate Division of the Supreme Court of New York, in suspending Giuliani, responded to his overarching First Amendment defense by stating that "speech by an attorney is subject to greater regulation than speech by others." Without performing any searching or specific analysis, the court summarily and overarchingly concluded that "while there are limits on the extent to which a lawyer's right of free speech may be circumscribed, these limits [we]re not implicated" by Giuliani's case.[10]

Unfortunately, in recent years, a significant contingent of legal scholars have advocated a view that lawyers generally lack First Amendment rights, with several of them adhering to a constitutional conditions approach.[11] Under a constitutional conditions approach, lawyers relinquish their First Amendment rights against professional regulation as a condition of obtaining a license to practice law. As Benjamin Cardozo pronounced more than a century ago: "[t]he practice of law is a privilege burdened with conditions."[12] And more recently, Chief Justice Rehnquist for a plurality in *Gentile* maintained:

> When petitioner was admitted to practice law before the Nevada courts, the oath which he took recited that "I will support, abide by and follow the Rules of Professional Conduct as are now or may hereafter be adopted by the Supreme Court . . . ." The First Amendment does not excuse him from that obligation, nor should it forbid the discipline imposed upon him by the Supreme Court of Nevada.[13]

9. *King*, 2021 WL 3771875, at *1 n.2 (quoting *Mezibov*, 411 F.3d at 717, 720–21 (quoting *Gentile*, 501 U.S. at 1071)).
10. *Giuliani*, 146 N.Y.S.3d at 270.
11. *See, e.g.*, Tarkington, *supra* note 7.
12. *In re* Rouss, 116 N.E. 782, 783 (N.Y. 1917) (Cardozo, J.).
13. *See Gentile*, 501 U.S. at 1081 (Rehnquist, C.J., dissenting in part) (citation omitted).

The constitutional conditions theory has been rejected as unconstitutional in other contexts,[14] and prior to 2016, scholarly commentary overarchingly rejected it in the context of lawyer First Amendment rights.[15] Moreover, the Supreme Court in a score of cases has recognized the existence of lawyers' First Amendment rights, including vis-à-vis state bar regulations and even in the practice of law.[16] Yet the 2016 promulgation of Model Rule 8.4(g) appears to have revitalized the constitutional conditions theory among scholars who argue that rule as

14. Indeed, the normal parlance and understanding of this idea is the exact reverse of what it is in the attorney context; it is the "unconstitutional conditions" doctrine because it is unconstitutional to make relinquishment of a constitutional right a condition of obtaining a government-supplied benefit. *See* Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (explaining that the unconstitutional conditions doctrine "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether").

15. *See, e.g.*, Monroe Freedman & Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607, 617 (1977); Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 863–67 (1998); *see also* Renee Newman Knake, *Legal Information, the Consumer Law Market, and the First Amendment*, 82 FORDHAM L. REV. 2843, 2844–45 (2014); Peter Margulies, *Advocacy as a Race to the Bottom: Rethinking Limits on Lawyers' Free Speech*, 43 U. MEM. L. REV. 319, 324 (2012); Kathleen Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 585–87 (1998) (analogizing attorney speech to public employees, government-funded speech and speech in a nonpublic forum); W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 375–81 (2001) (same); Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161, 187–90 (2008) (analogizing attorney speech to public employee speech); Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665 (2000) [hereinafter Andrews, *Motive Restrictions*]; Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO STATE L.J. 557 (1999) [hereinafter Andrews, *A Right of Access*]; Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27 (2011).

16. *See, e.g.*, Williams-Yulee v. Fla. Bar, 575 U.S. 433 (2015) (addressing speech restrictions on judicial candidates); Holder v. Humanitarian L. Project, 561 U.S. 1 (2010); Milavetz, Gallop & Milavetz v. United States, 559 U.S. 229 (2010); Republican Party of Minn. v. White, 536 U.S. 765 (2002); Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995); *Gentile*, 501 U.S. 1030; Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626 (1985); Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984); *In re* R.M.J., 455 U.S. 191 (1982); *In re* Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Garrison v. Louisiana, 379 U.S. 64 (1964); NAACP v. Button, 371 U.S. 415 (1963); Konigsberg v. State Bar of Cal., 353 U.S. 252 (1957); Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232 (1957).

promulgated is constitutionally sound,[17] as well as by the ABA in two of its more recent formal opinions.[18]

But this approach to lawyer First Amendment rights, although currently popular in the legal academy, is misdirected. Lawyers must and should have recognized and enforceable First Amendment rights—even against professional regulation and discipline. Nevertheless, those rights must be attuned to the role of the lawyer in the system of government. Consequently, I have advocated the access to justice theory, which attunes the First Amendment rights of lawyers to their role in the justice system.[19] This approach does not result in a forfeiture of lawyer First Amendment rights either entirely or in the practice of law. Instead, under the access to justice theory, the core of attorney First Amendment rights is the protection of attorney speech, association, and petitioning that provides access to law and to legal processes—thus protecting the work of lawyers (paid or not; transactional or litigation; civil, administrative, or criminal) that serves to invoke or avoid the power of government in securing individual or collective life, liberty, or property. The primary work of the lawyer falls neatly within the ambit of the First Amendment—lawyers associate with clients, advise them and invoke the law through speech, and petition on behalf of clients to protect individual and collective life, liberty, and property. The First Amendment also protects the attorney's role in enabling and invoking judicial and administrative power as lawyers institute cases and controversies before such bodies. By protecting lawyers' advice, advocacy, and petitioning, the First Amendment protects the ability of the

17. *See* Tarkington, *supra* note 7 (citing MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016)) (reviewing post-2016 scholarship that adopts a constitutional conditions or similar approach arguing that the First Amendment is not a barrier to professional regulation by the state bar or judiciary).

18. ABA Comm. on Ethics and Pro. Resp., Formal Op. 480 (2018); ABA Comm. on Ethics and Pro. Resp., Formal Op. 493 (2020). Indeed, the ABA asserts that lawyers' First Amendment rights are "not without bounds" as "[l]awyers' professional conduct may be constitutionally constrained by various professional regulatory standards as embodied in the Model Rules, or similar state analogs." Formal Op. 480, at 4–5. The ABA further states that "regulation of lawyer speech 'is appropriate in order to maintain the public confidence and credibility of the judiciary and as a condition of '[t]he license granted by the court.'" Formal Op. 493, at 9 (alteration in original) (quoting Ky. Bar Ass'n v. Blum, 404 S.W.3d 841, 855 (Ky. 2013) (quoting *In re* Snyder, 472 U.S. 634, 644 (1985))).

19. The access to justice theory of the First Amendment is fully explored in my book, MARGARET TARKINGTON, VOICE OF JUSTICE: RECLAIMING THE FIRST AMENDMENT RIGHTS OF LAWYERS (2018), which sets out the theory and then applies it in various core contexts. *See also* Tarkington, *supra* note 15 (proposing the access to justice theory).

lawyer to play a major role in checking governmental power, as well as institutional and economic power.[20]

The access to justice theory also recognizes that there are restrictions on attorney speech that are essential to preserve the integrity of the justice system and the role of the lawyer therein. Thus, the First Amendment does *not* protect from discipline attorney speech that would frustrate or undermine the integrity of court processes, the constitutional and legal rights of case participants, or the core fiduciary duties owed to clients.[21]

Gentile's dicta—quoted in the Giuliani disciplinary proceeding and the *King* sanctions ruling against Powell and Wood—that lawyers perhaps do not have *any* First Amendment rights in the courtroom is incorrect and conflicts with other Supreme Court caselaw showing the importance of protecting lawyer's rights, even when acting as lawyers. *NAACP v. Button* and *Legal Services Corp. v. Velazquez* are illustrative.

In *NAACP v. Button*, several of the Southern states, in resistance to *Brown v. Board of Education*,[22] amended their professional conduct rules by redefining solicitation to prohibit the NAACP from obtaining clients and instigating desegregation lawsuits on their behalf.[23] The Virginia Supreme Court had held that the NAACP's activities of holding meetings with parents of schoolchildren, advising them of their legal rights, offering to represent them, and then instigating desegregation litigation were prohibited by the redefined prohibition on solicitation and that the First Amendment did not offer them recourse. The Supreme Court reversed, holding that the statute as construed by the Virginia Supreme Court unconstitutionally violated the First Amendment rights of "speech, petition, [and] assembly" of both the attorneys and their clients, specifically recognizing the attorneys' rights to engage in "political expression and association" by associating with these clients, advising them of their rights, and then petitioning the government for redress on their behalf.[24] Virginia (along with other Southern states) had only technically regulated *attorney*

20. TARKINGTON, *supra* note 19, at 90.

21. *See generally id.* chs. 5–14 (explaining the contours of the access to justice theory both generally and as applied in specific contexts, including association with clients, client counseling, invoking law and legal processes, impugning judicial integrity, securing constitutional criminal protections, pretrial publicity, and attorney civility, harassment, and discrimination).

22. 347 U.S. 483 (1954).

23. *See* NAACP v. Button, 371 U.S. 415, 445–46 (Douglas, J., concurring).

24. *Id.* at 430–31 (majority opinion).

speech—but that restriction on attorney speech had the (intended) effect of undermining the rights of Black Americans and foreclosing their ability to either know or attain their constitutional rights to desegregation.

As *Button* illustrates, government entities and regulators, if free to regulate without the constraints of the First Amendment, could infringe the constitutional rights of disfavored or unpopular groups simply by restricting lawyer speech and association. In deciphering the contours of the First Amendment in the context of Trump's lawyers and the Big Lie, it is essential that we do not undermine the essential recognition and protection of lawyer rights to association, speech, advocacy, and petitioning—even, and especially, for unpopular groups and views. Even among lawyers, the First Amendment requires that we "maintain the principles of free discussion in case[s] of unpopular sentiments or persons, as *in no other case will any effort to maintain them be needed*."[25]

Lawyers are integral, not only to the protection of client rights, but also to the invocation and exercise of the judicial power in our system of government. Although the judiciary is the branch of government constitutionally designed to interpret the law and provide remedies and punishment for law violation and legal injuries, it cannot perform these functions on its own. The judiciary only has power to adjudicate cases and controversies that are brought before it; thus, it relies on lawyers to enable the exercise of its government powers. The judiciary cannot protect or enforce rights; it cannot interpret or uphold federal law; and it cannot check the other branches of government (or even abuse in its own branch) without attorneys who bring cases before it.[26]

Attorneys have an enforced monopoly on effective access to the judiciary. Restrictions on the unauthorized practice of law forbid nonlawyers from representing other people in court. Although individuals can proceed pro se, self-representation is often ineffective, and organizations generally are prohibited from proceeding pro se in judicial proceedings.[27] In both civil and criminal matters, attorney-client association and attorney speech and petitioning are essential to provide *effective* access to the judiciary for individuals and *all* access to the judiciary for

25. ZECHARIAH CHAFFEE, FREEDOM OF SPEECH 3 (1920) (emphasis added).
26. TARKINGTON, *supra* note 19, at 25.
27. *See, e.g.*, D-Bean Ltd. P'ship v. Roller Derby Skates, Inc., 366 F.3d 972 (9th Cir. 2004).

organizations and associations. This role of attorneys—providing access to the judiciary—is as essential to our justice system as is the judiciary itself.

Additionally, in protecting the NAACP's filing of lawsuits from professional discipline by the state bar, the *Button* Court cited the Petition Clause and relied on the seminal *Noerr* case of Petition Clause jurisprudence.[28] Under the so-called *Noerr-Pennington* doctrine, the Supreme Court has recognized that the right to petition includes a protectable right to bring nonfrivolous claims in litigation, whether based on state or federal law.[29] Consequently, in order for someone to be punished for filing civil claims, the claims must be a "sham"—that is, the claims must be "so baseless that no reasonable litigant could realistically expect to secure favorable relief."[30] The Petition Clause of the First Amendment thus protects attorneys from professional discipline for the filing of a lawsuit unless the lawsuit is "objectively baseless."[31] Further, in *Legal Services Corp. v. Velazquez*,[32] the Supreme Court recognized an attorney's own First Amendment right to make relevant claims and arguments in court proceedings on behalf of a client. The *Velazquez* Court noted that attorneys' First Amendment rights are essential, not only to the vindication of their clients' rights, but also to the proper functioning of the judiciary itself. The Court explained that attorneys engage in "speech and expression *upon which the courts must depend* for the proper exercise of the judicial power."[33]

Velazquez involved restrictions placed on attorneys who accepted funds from the congressionally created Legal Services Corporation (LSC). At issue were congressionally imposed restrictions on recipients of LSC funds specifically prohibiting attorneys from providing any representation that "involve[d] an effort to amend or otherwise challenge existing welfare

28. *See Button*, 371 U.S. at 430–31. This Petition Clause right is often called the *Noerr-Pennington* doctrine after the leading cases on the matter. *See* E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

29. *See, e.g.*, Christopher v. Harbury, 536 U.S. 403, 414–15 (2002); Pro. Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 62–63 (1993); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983); *see also* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LEGAL ETHICS 25–28 (4th ed. 2010) (explaining that "civil litigation is part of the First Amendment right to petition, through the courts, for redress of grievances"). *See generally* Andrews, *A Right of Access*, *supra* note 15.

30. *Pro. Real Estate*, 508 U.S. at 62.

31. *Id.* at 60.

32. 531 U.S. 533 (2001).

33. *Id.* at 545 (emphasis added).

laws," including challenges as to their validity or constitutionality.[34] The Supreme Court struck down the regulations as violative of the First Amendment, explaining that the restrictions were "inconsistent with the proposition that attorneys *should present all the reasonable and well-grounded arguments necessary for proper resolution of the case*."[35] The Court further explained that by "[r]estricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts," the regulation "distort[ed] the legal system *by altering the traditional role of the attorneys*."[36] As with the access to justice theory, the *Velazquez* Court recognized that the First Amendment rights of lawyers must be defined in a way that would not "alter" the role of the lawyer in the system of justice and thus "distort the legal system."[37]

Further, the *Velazquez* Court recognized that by prohibiting lawyer speech and the ability of attorneys to raise certain arguments, the regulation also distorted the judicial power itself. The Court explained: "By seeking to *prohibit the analysis of certain legal issues* and *to truncate presentation to the courts*, the enactment under review *prohibits speech and expression upon which the courts must depend* for *the proper exercise of the judicial power*."[38] If lawyers cannot raise certain arguments to the judiciary, then the judiciary cannot hear or adjudicate those claims. Thus it is essential that lawyers be protected in raising colorable claims and making nonfrivolous arguments in court proceedings—because if they are not, then the judicial power itself can be undermined.

Finally, lawyers have a right to associate with clients—even bad actor clients.[39] One of the most alarming features of the *NAACP v. Button* case, as well as *Holder v. Humanitarian Law Project*, is that if regulators (in both of those cases, legislatures) can punish and prohibit attorneys from representing certain clients, then the whole attorney-client relationship and all attendant rights collapse.[40] There is simply nothing left. The rights of both the attorneys who wished to undertake the representation and the legal

34. *Id.* at 537.
35. *Id.* at 545 (emphasis added).
36. *Id.* at 544 (emphasis added).
37. *Id.*
38. *Id.* at 545 (emphasis added).
39. *See* TARKINGTON, *supra* note 19, at 101–18.
40. *See id.* at 102–06; *see also* NAACP v. Button, 371 U.S. 415 (1963); Holder v. Humanitarian L. Project, 561 U.S. 1 (2010).

rights and objectives of clients are all extinguished. The lawyer who cannot associate with a client cannot protect that client's interests or fulfill her role in invoking or avoiding government power in the protection of life, liberty, and property. Nor can the client effectively protect her own legal interests without associating with an attorney.

Under the access to justice theory, the attorney must have a First Amendment right to associate with clients—a right undergirded by the client's concomitant Fifth and Sixth Amendment rights to counsel. That right cannot be extinguished by a client's prior bad acts unless the lawyer is assisting the client in criminal or fraudulent conduct. There is no place for guilt by association in the realm of attorney-client associations; it is antithetical to our justice system and the constitutional requirements of due process of law.

II. ANALYZING THE SPECIFIC CONTEXT OF TRUMP'S BIG LIE AND POWER GRAB

As just reviewed, under the access to justice theory, attorney association, advice, and petitioning are protected by the First Amendment. Trump's attorneys associated with him, advised him, made statements to the public in several different contexts, and advocated on his behalf in court proceedings. These are differing types of First Amendment activities, each of which needs to be separately considered and analyzed. Indeed, one of the errors in the *Giuliani* suspension order was that the New York court summarily considered and dismissed Giuliani's First Amendment argument as a single overarching defense without breaking it down and analyzing its applicability to the different types of First Amendment activities in which he was engaged and which raise separate and distinct considerations.[41] The various contexts implicated by lawyers involved with Trump's attempt to overturn the 2020 election include: (1) advice and/or assistance to Trump about what actions he could or should take; (2) the filing of cases and other court advocacy; (3) pretrial publicity and non-court "hearings"; (4) statements made at the January 6, 2021, "Save America" rally at the Ellipse; and (5) obligations to report up, out, or resign.

41. *In re* Giuliani, 146 N.Y.S.3d 266, 270 (App. Div. 2021).

A. Advice and Assistance

To start with, under the access to justice theory of the First Amendment, Trump's lawyers had a First Amendment right to associate with him (as they would with any litigant) which is undergirded by Trump's own due process right to retain counsel.[42] Further, under the access to justice theory, full and frank advice from attorney to client regarding the lawfulness and unlawfulness of proposed or past conduct, the reach and purpose of the law, and liability or punishment under the law is subject to core First Amendment protection.[43]

But the fact that Trump has a due process right to associate with attorneys and that they have First Amendment rights to associate with and advise him and to petition on his behalf does not allow either Trump or his attorneys to use that association, advice, and petitioning in a manner that will undermine the system of justice and—in the case of the Big Lie and the January 6 insurrection—undermine our entire system of government. Indeed, the corollary to the access to justice approach is that the First Amendment does not forbid restrictions on attorney speech, association, and petitioning that are essential to preserve the integrity of the justice system and the role of the lawyer therein. Through their license, lawyers are delegates of state power.[44] As with all delegates of state power in a democratic system of government, the lawyer's use of government power contains limitations that conform to the attorney's role in the justice system.

Perhaps most elementary, attorneys can be prohibited from using the power of the state that they receive through their license to engage in or further unlawful, criminal, or fraudulent activity. Lawyer association and speech is tied to accessing government power. States provide lawyers the ability to invoke law on behalf of clients and obtain the protection of the courts and other governmental processes. It would absolutely frustrate the

42. *See* TARKINGTON, *supra* note 19, at 78.

43. *Id.* at 123–26.

44. As explained in *Voice of Justice*, lawyers are delegates of state power, yet it is important to recognize that the political power "that the judiciary has and which it 'delegates' by admission to the bar to attorneys derives from the entire body politic, of which the attorney remains a part." Thus, even as "delegates of state power, attorneys retain their sovereign rights as citizens over their subordinate governmental agents, including the judiciary" and as lawyers "also must be able to assert the client's rights as a citizen with the ultimate sovereignty to check government power, including judicial power." *See id.* at 44–46.

justice system if lawyers could freely use this grant of government power to commit or conceal crimes, fraud, or other illegal acts. Thus states are free to forbid lawyers from using the power of the state to advise or assist clients in committing crimes or frauds.[45] Lawyers simply do not have a constitutional right to associate with clients for unlawful, criminal, or fraudulent ends. Notably, such a restriction does not create guilt by association because it is the lawyer's *own* acts in advising or assisting the client in unlawful, criminal, fraudulent conduct that makes the association and advocacy proscribable.[46]

Consequently, Trump's attorneys could (and should) be disciplined to the extent they counseled or assisted Trump in illegal, criminal, and fraudulent action. Importantly, given Trump's position as President of the United States, advising him on what actions he can take, even as his own personal lawyer, carries with it weighty responsibilities precisely because of the governmental power that the President can command as the head of the executive branch and the Commander-in-Chief of one of the strongest militaries in the world. As Vincent Blasi stated, "the abuse of official power" is, in fact, "an especially serious evil."[47] Government officials can commandeer the police power of the state and the full weight of government power for their selfish ends if the abuse of their power is not checked.

Advising the executive of one of the most powerful nations in the world that he can use his office and official power to overturn an election and stay in power—basically overthrowing our democratic government—is an unfathomable violation of the attorney's role in our system of government and oath to uphold the Constitution. Yet John Eastman advised Trump (and Pence) that Pence had the power to "gavel[] [in] President Trump as re-elected," on January 6.[48] Eastman's memos containing this advice included

45. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 2020).

46. *See* TARKINGTON, *supra* note 19, at 107–13; Margaret Tarkington, *Freedom of Attorney-Client Association*, 2012 UTAH L. REV. 1071, 1100–07.

47. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RSCH. J. 521, 538 (1977).

48. *See* Memorandum from John Eastman (Jan. 2, 2021) [hereinafter Two-Page Eastman Memo], http://cdn.cnn.com/cnn/2021/images/09/20/eastman.memo.pdf [https://perma.cc/RR28-8VEC]. Eastman wrote two memos, neither of which is dated, signed, or addressed to anyone, with the heading "Privileged and Confidential." The first memo was a two-page memo, apparently written on January 2, and a second six-page memo was purportedly written on January 3. The two-page memo was given to Mike Pence, who in turn gave it to retired federal judge J. Michael Luttig to ask Luttig's advice about whether he agreed with the advice that Eastman was giving (Luttig emphatically disagreed with Eastman's advice). *See* Joseph M. Bessette, *A Critique of the Eastman Memos*, CLAREMONT REV.

deceptive, untrue, and fraudulent statements—such as the claim that there were multiple slates of electors for certain states (there were not),[49] that Pence was the "ultimate arbiter" under the Constitution to determine the result[50] and could even declare Trump the winner,[51] and that such "bold" action was justified because "this Election was Stolen by a strategic Democrat plan to systemically flout existing election laws."[52] Additionally, Eastman apparently understood that his advice lacked a reasonable basis in law—and was, indeed, untethered from law. According to Greg Jacob—Pence's attorney who attended the January 4 meeting with Pence, Trump, and Eastman—at that meeting, "Eastman conceded that his argument was contrary to consistent historical practice, would likely be unanimously rejected by the Supreme Court, and violated the Electoral Count Act on four separate grounds."[53] If lawyers are permitted to give legal advice for

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BOOKS, Fall 2021, https://claremontreviewofbooks.com/critique-eastman-memos/ [https://perma.cc/SL9H-C4F5]. The six-page Eastman memo is also publicly available. Memorandum from John Eastman (Jan. 3, 2021) [hereinafter Six-Page Eastman Memo], http://cdn.cnn.com/cnn/2021/images/09/21/privileged.and.confidential.--.jan.3.memo.on.jan.6.scenario.pdf [https://perma.cc/7LE4-K7BJ].

49. *See* Two-Page Eastman Memo, *supra* note 48, at 1. The two-page memo opens with the ominous (and untrue) statement: "7 states have transmitted dual slates of electors to the President of the Senate." *See* Jonathan H. Adler, *The Eastman Memo: Poor Lawyering for a Disreputable Cause*, REASON: VOLOKH CONSPIRACY (Sept. 21, 2021, 9:06 AM), https://reason.com/volokh/2021/09/21/the-eastman-memo-poor-lawyering-for-a-disreputable-cause/ [https://perma.cc/HSS9-L6D6] (explaining that both memos rely "on the false claim that there were 'dual slates of electors' transmitted to the Senate"); Bessette, *supra* note 48 (explaining that "[i]n no case did any public official or public agency send in more than one slate of electors" and that what is apparently being referred to came from individuals who identified themselves as electors for Trump and sent their "votes" to Pence directly but were not actual electors under the law or through the certification procedures of any state).

50. *See* Two-Page Eastman Memo, *supra* note 48, at 2; Six-Page Eastman Memo, *supra* note 48, at 6.

51. *See* Two-Page Eastman Memo, *supra* note 48, at 1; Six-Page Eastman Memo, *supra* note 48, at 4–6.

52. *See* Six-Page Eastman Memo, *supra* note 48, at 5.

53. This quotation is taken from findings made in the March 28, 2022, decision of the United States District Court for the District of California, which rely on Greg Jacob's deposition testimony. Eastman v. Thompson, Case No. 8:22-cv-00099-DOC-DFM, 2022 WL 894256, at *7 (C.D. Cal. Mar. 28, 2022) (Order Re Privilege of Documents Dated January 4-7, 2021) (also available at https://www.cacd.uscourts.gov/sites/default/files/documents/Dkt%20260%2C%20Order%20RE%20Privilege%20of%20Jan.%204-7%2C%202021%20Documents_0.pdf). In the District of California case, Eastman sued the Congressional committee investigating the January 6 attack to stop Chapman University from responding to a subpoena and turning over emails between Eastman and Trump related to the January 6 attack. On March 28, 2022, the District of California held that Eastman's communications with Trump were *not* covered by the attorney-client privilege because they were made in furtherance of a crime or fraud and thus fell within the crime-fraud exception to the privilege. Notably, the court did not use the term "crime or fraud" in a generalized fashion but specifically found by a

government clients to act upon that is untethered from what the law actually is or even could be (given that Eastman admitted that the Supreme Court would not uphold it), then law itself is ineffectual and meaningless. Moreover, Eastman's "legal" advice had an intended fraudulent effect—specifically, to fraudulently pressure Mike Pence to refuse to count the certified votes and (following one of Eastman's proposed methods) declare Trump the winner of a presidential election he lost. In a similar vein, Sidney Powell advised Trump that he could use the National Emergencies Act to issue an executive order to take control of the vote count, appoint her as special counsel to investigate the election, and seize voting machines.[54]

It was only because of other lawyers that Powell's and Eastman's advice did not result in action. Bill Barr shut down the appointment of special counsel.[55] Pence sought advice from other lawyers—including former Vice President Dan Quayle, his personal attorney Greg Jacob, Senate Parliamentarian Elizabeth MacDonough, John Yoo, Richard Cullen, and J. Michael Luttig—all of whom advised Pence in no uncertain terms that Eastman's advice was wrong and that Pence had absolutely no power to do anything other than count the votes and announce Biden's victory.[56]

Similarly in the Department of Justice, Jeffrey B. Clark, who was serving as the acting head of the Civil Division of the DOJ, on December 28, 2020, sent to his superiors (Acting Attorney General Jeff Rosen and Acting Deputy Attorney General Richard Donoghue) a draft letter that he proposed be sent by the DOJ to the governor, speaker, and president pro tempore of Georgia, Pennsylvania, Michigan, Wisconsin, Arizona, and Nevada.[57] The draft letter stated that because of "irregularities" that the DOJ

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preponderance of the evidence that the communications between Eastman and Trump were made in furtherance of the following specific crimes and frauds: criminal obstruction of an official proceeding in violation of 18 U.S.C. § 1512(c)(2) and criminal conspiracy "to defraud the United States by disrupting the electoral count, in violation of 18 U.S.C. § 371." *See id.* at *19–26.

54. WOODWARD & COSTA, *supra* note 1, at 194–95.

55. *Id.* at 193–97.

56. *Id.* at 198–201, 205, 214–15, 237–38.

57. MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, SUBVERTING JUSTICE: HOW THE FORMER PRESIDENT AND HIS ALLIES PRESSURED DOJ TO OVERTURN THE 2020 ELECTION 21–22 (2021) [hereinafter SUBVERTING JUSTICE], https://www.judiciary.senate.gov/imo/media/doc/Interim%20Staff%20Report%20FINAL.pdf [https://perma.cc/ME7F-5MQ9]. Clark indicated he wrote the letter, but there were two other DOJ lawyers who apparently were working with Clark to some extent: Doug Smith, the Deputy Assistant Attorney General for the Civil Division, and Kenneth Klukowski, Civil Division Senior Counsel. The Senate Judiciary Committee's report states: "[t]he extent of Klukowski's and Smith's role in Clark's

had "taken notice" of, "the Department recommends" that the state legislature should convene "a special session." As summarized by the Senate Judiciary Report, the letter "outlined a path" for each state legislature to "take advantage of the Joint Session of Congress's certification procedure and replace the [state's] Presidential Electors lawfully chosen by the popular vote with a slate of Electors appointed after-the-fact by the legislature."[58] Rosen and Donoghue flatly and repeatedly refused to sign or in any way endorse such a letter. But Clark was working with and advising Trump, and on January 2 and 3, Clark informed Rosen that Trump was going to install Clark as the new Attorney General. On January 2, Rosen was told he could avoid being fired if he would "reconsider his refusal to sign Clark's proposed letter" to state legislatures. Rosen refused.[59] On January 3, Rosen was informed that Clark would be taking his place (and presumably, Clark, through the power of the DOJ, would then pressure states to appoint alternate slates of electors for Trump). Again, it was only because of attorneys who stood up to Trump and adhered to their oath that this plot failed. The senior leadership of the DOJ told Trump they would resign en masse if he went through with his and Clark's plan. This group included, in addition to Donoghue, the following attorneys:

- Patrick Hovakimian, Associate Deputy Attorney General;
- Claire Murray, Principal Deputy Associate Attorney General;
- Jeffrey Wall, Acting Solicitor General;
- Makan Delrahim, Assistant Attorney General for the Antitrust Division;
- Steve Engel, Assistant Attorney General for the Office of Legal Counsel;

scheme is unclear from the limited documents produced by DOJ." *Id.* at 36. Nevertheless, the report also explains that "[e]mails suggest that Klukowski had played a role in Clark's 'Proof of Concept' letter [to send to state legislatures], a copy of which Klukowski emailed Clark at 4:20 p.m. on December 28—just twenty minutes before Clark sent the proposal to Rosen and Donoghue." *Id.*

58. *Id.*

59. *Id.* at 34.

- John Demers, Assistant Attorney General for the National Security Division;
- Eric Dreiband, Assistant Attorney General for the Civil Rights Division; and
- David Burns, Principal Deputy Assistant Attorney General for the National Security Division and Acting Assistant Attorney General for the Criminal Division.[60]

A meeting was held where Rosen, Donoghue, and Engel confronted Trump with the resignations that would follow if Clark were installed as Attorney General.[61] Donoghue explained to Trump that "the mass resignations likely would not end there, and that U.S. Attorneys and other DOJ officials might also resign en masse."[62] At the meeting, two White House lawyers who attended, Pasquale ("Pat") Cipollone and Patrick Philbin, also indicated that they would resign if Clark were installed and sent the letters.[63] After two to three hours of pressure from these lawyers, Trump relented.[64] Clark was not installed and the letters were never sent to state legislatures. Clark has recently been referred to the D.C. bar for discipline for his role.[65]

Clark's advice to Trump and work product (the draft letter) should in fact subject him to discipline. Although advice to clients is often protected from discipline by the First Amendment, Clark had no First Amendment right to advise and assist in using his power as an attorney for the DOJ (where he represents the U.S. Government and not Trump personally) to pressure states into submitting alternate (false) slates of electors for the presidential election. In Clark's case, he also violated his duty of loyalty to his actual client, the U.S. Government, the integrity of which depends upon the acceptance of valid election results. In working to submit false electors to overturn a presidential election, he worked directly against the impartial interests of his client.

60. *Id.* at 37.
61. *Id.* at 38 ("Trump opened the meeting by stating, 'One thing we know is you, Rosen, aren't going to do anything to overturn the election.'").
62. *Id.*
63. *Id.*
64. *Id.* at 38–39.
65. *See* Letter from Donald Ayer et al. to Hamilton P. Fox, III, *supra* note 5.

Additionally, Cleta Mitchell, an attorney at Foley and Lardner, assisted Trump and joined him on the now notorious January 2, 2021, phone call to Georgia Secretary of State Brad Raffensperger "to pressure him to change the state's vote totals from the 2020 election."[66] On the call, Trump specifically requested that Raffensperger "find 11,780 votes" for Trump—exactly enough votes for Trump to win the state.[67] Mitchell actively assisted Trump in trying to pressure a state official to change the vote count so that Trump would win rather than the candidate selected by the people.

Notably, the entire Big Lie is a fraud—and there is evidence that Trump's own campaign was aware as early as November 14, 2020, that their claims about voting machines were baseless.[68] Indeed, not only is advice supporting the Big Lie and the overturning of the election illegal, and even "unconstitutional" in the normal sense—it is actually anticonstitutional in that it works to undermine our entire constitutional scheme of government. Fortunately, there were lawyers surrounding Trump who refused to assist in the fraud and who advised him that the election was accurate overall and that Trump had lost. These lawyers included Bill Barr,[69] Christopher Krebs,[70] Jeff Rosen, Richard Donoghue, and Byung Jim (BJay) Pak.[71] These lawyers ultimately recognized their duty to not assist in unlawful, criminal,

66. SUBVERTING JUSTICE, *supra* note 57, at A-7.

67. SUBVERTING JUSTICE, *supra* note 57, at 29–30, 33.

68. *Id.* at A-1 (stating that on Nov. 14, 2020, "The Trump campaign itself prepares and distributes an internal memorandum rebutting various allegations regarding Dominion Voting Systems, reflecting its early knowledge that such allegations are baseless."); *see also* Alan Feuer, *Trump Campaign Knew Lawyers' Voting Machine Claims Were False*, N.Y. TIMES (Nov. 6, 2021), https://www.nytimes.com/2021/09/21/us/politics/trump-dominion-voting.html [https://perma.cc/L5FF-MUQD].

69. Bill Barr's situation is complicated because he undermined DOJ policy about involvement in election investigations and made public statements both before the election and after it (but before certification) that indicated that the election was or could be compromised. *See, e.g.*, SUBVERTING JUSTICE, *supra* note 57, at 5 (noting that Barr made public statements before the election to cast doubt on mail-in voting); *id.* at A-1 (explaining on Nov. 9, 2020, Barr issued a memo "weakening DOJ's longstanding election noninterference policy"). Yet, ultimately, he publicly declared that there was no fraud that would change the outcome of the election, which led directly to his resignation. *See id.* at 13, A-2 to A-3 (explaining that Barr announced on December 1 and December 21 that there was no widespread election fraud that could effect a change in the outcome of the election); WOODWARD & COSTA, *supra* note 1, at 169–73, 196–97.

70. WOODWARD & COSTA, *supra* note 1, at 159.

71. SUBVERTING JUSTICE, *supra* note 57, at 5, 39–42 (explaining that U.S. Attorney for the Northern District of Georgia Byung Jin ("BJay") Pak, "investigated and did not substantiate various claims of election fraud advanced by Trump and his allies," that Trump accused him of being a "Never Trumper" and agreed not to fire Pak only if Pak agreed to resign the next day, which he did).

or fraudulent conduct, and in this case, the overthrow of our democracy. Thus, they advised President Trump that he had lost and the election was safe, secure, and accurate with Biden as the winner. Barr, Krebs, and Pak were forced to resign or fired from their governmental appointments because of their advice,[72] and as noted above, Rosen and Donoghue had to enlist the help of much of the leadership of the DOJ to avoid being fired and replaced by an attorney who would do Trump's bidding.[73]

Yet those attorneys who advised Trump that he could overturn the election still did significant damage. At the January 6 "Save America" rally at the Ellipse, Trump specifically relied on the advice from John Eastman and told the crowd that Eastman, "the number one or certainly one of the top constitutional lawyers in our country," had advised him that Pence "has the absolute right" to not count the certified electoral votes but could instead "send it back to the States to recertify, and [Trump will] become president, and you are the happiest people."[74] Moreover, at the rally, Trump catalogued many of the allegations of election fraud that were pushed by Giuliani and Powell in lawsuits and pretrial publicity.[75] Trump absolutely needed attorneys who would advise him of actual legitimate legal challenges to the election or vote counting that could be made in court (and were) and then, when those failed, who would correctly advise him that he had lost the election and needed to concede and effectuate the peaceful transfer of power that is the hallmark of changes in the U.S. presidency. It was extremely problematic that a power-hungry executive was advised by attorneys like Giuliani, Powell, Mitchell, and Eastman, who continuously advised him—after the loss of nearly sixty lawsuits challenging the

72. *See id.* at 43; *see also supra* note 69 (discussing Barr's statements and resignation); WOODWARD & COSTA, *supra* note 1, at 159.

73. *See* SUBVERTING JUSTICE, *supra* note 57, at 20–39.

74. Donald Trump, President of the U.S., Statements at the Save America Rally (Jan. 6, 2021) [hereinafter Trump Rally Statements], https://www.rev.com/blog/transcripts/donald-trump-speech-save-america-rally-transcript-january-6 [https://perma.cc/MY66-3SVM]. Giuliani similarly relied on Eastman's advice in his comments at the Save America Rally on January 6, stating that Eastman was "one of the preeminent constitutional scholars in the United States" and advised them that as Vice President, Pence "can cast [the votes] aside" and "can decide on the validity of these crooked ballots." John C. Eastman and Rudy Giuliani, Statements at the Save America Rally (Jan. 6, 2021) [hereinafter Giuliani & Eastman Rally Statements], https://www.rev.com/blog/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat [https://perma.cc/2Q8J-EAY5].

75. *See* Trump Rally Statements, *supra* note 74.

election—that he had been robbed[76] and could stay in office by pressuring Pence into not counting the votes (Eastman), by pressuring state officials to change the vote count (Mitchell), by getting the DOJ to send out letters to state legislatures telling them to certify alternate slates contrary to the vote count (Clark), or by appointing a special prosecutor to take over the vote count in each state (Powell). By advising and working to assist Trump to stay in power after losing the election, these lawyers emboldened him in his autocratic bid to take to himself governmental power contrary to the will of the people—and these attorneys can and should be punished for that advice and assistance undermining constitutional governance itself.

B. Court Filings and Advocacy

In addition to directly advising Trump (and Pence), Trump's lawyers petitioned on his behalf in filing scores of lawsuits challenging the election. Normally, petitioning and filing lawsuits is solidly protected by both the lawyer's and the client's First Amendment petitioning and speech rights. As the Supreme Court stated in *Button*: "[A]bstract discussion is not the only species of communication which the Constitution protects"; rather, the First Amendment also protects "litigation . . . [as] a means for achieving the lawful objectives of equality of treatment by all government."[77] Thus, in *King*, the court was incorrect that "in the context of courtroom proceedings, an attorney retains no personal First Amendment rights."[78] Indeed, in *Legal Services Corp. v. Velazquez*, the U.S. Supreme Court specifically recognized two categories of attorney in-court speech (including written and oral communications) that must be afforded First Amendment protection: (1) attorneys must be free to "present all the reasonable and well-grounded arguments necessary for proper resolution of the case";[79] and (2) regulators

76. Eastman's second memo states that resorting to questionable and underhanded tactics was justified because "this Election was Stolen by a strategic Democrat plan." *See* Six-Page Eastman Memo, *supra* note 48, at 5 ("[W]e're no longer playing by Queensbury Rules").

77. NAACP v. Button, 371 U.S. 415, 429 (1963).

78. King v. Whitmer, No. 20-13134, 2021 WL 3771875, at *1 n.2 (E.D. Mich. Aug. 25, 2021) (quoting Mezibov v. Allen, 411 F.3d 712, 717, 720–21 (6th Cir. 2005) (quoting Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991))); *see also id.* at *35.

79. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001).

cannot restrict attorney speech in order to "insulate the Government's laws" or government action "from judicial inquiry" and scrutiny.[80]

The lawyers who were sanctioned in *King* argued that their First Amendment rights were being violated because the sanctions served as "intimidation for filing a grievance against the government."[81] If they were correct that the basis for any sanctions was punishment for representing Donald Trump, or for suing government officials, or for bringing nonfrivolous claims contesting the integrity of the election, then such sanctions would violate the attorneys' First Amendment rights as defined in *Velazquez*—because the sanctions would be punishing the lawyers for raising colorable legal claims in order to "insulate" the government from appropriate scrutiny of alleged malfeasance and thus would "prohibit[] speech and expression [of attorneys] upon which the courts must depend for the proper exercise of the judicial power."[82]

But that's not why the attorneys in *King* or *O'Rourke*[83] were sanctioned. There are limits to the First Amendment rights of lawyers in court advocacy. The system of justice would not be a system of "justice" if lawsuits could readily be based on lies and fraud or if lawsuits could proceed without having any cognizable basis in law. As the Fourth Circuit elaborated, in a related context:

> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect,

80. *See id.* at 546.
81. *King*, 2021 WL 3771875, at *35.
82. *Valezquez*, 531 U.S. at 544–47.
83. O'Rourke v. Dominion Voting Sys., Inc., No. 20-cv-03747, 2021 WL 3400671 (D. Colo. Aug. 3, 2021).

> the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.[84]

The Fourth Circuit emphasized the important role that attorneys play in this system, as they "have the first line task of assuring the integrity of the process."[85] Professor Renee Knake Jefferson similarly pointed out that "[i]n today's post-truth era, courts are among the rare fora where statements must still be supported by evidence-based verifiable facts. To be sure, the courthouse is not a pristine arbiter of truth. But it is one of the last places where rules cling to the goal of truth-telling, even if imperfectly."[86]

Consequently, the basic requirements of Federal Rule of Civil Procedure 11, and corresponding Model Rule of Professional Conduct 3.1, that court filings and advocacy must have a reasonable basis in fact and in law and that lawyers must perform basic due diligence[87] are constitutionally permissible limits on lawyers' First Amendment rights in court proceedings—because these limits are essential to the integrity of the justice system and the role of the lawyer therein.[88] And under the liberal *Noerr-Pennington* doctrine surrounding the First Amendment petitioning right, a litigant and counsel can be sanctioned (and thus could also be disciplined) for filing baseless or sham litigation.[89] Thus, although the court in *King* overstates the matter when asserting that lawyers have *no* First Amendment rights in litigation, the court is nevertheless basically correct in stating that while "[i]ndividuals may have a right (within certain bounds) to disseminate allegations of fraud unsupported by law or fact in the public sphere, . . . attorneys cannot exploit their privilege and access to the judicial process to do the same."[90] The court expounds that "attorneys have an obligation to the judiciary, their profession, and the public (i) to conduct some degree of due diligence before presenting allegations as truth; (ii) to advance only tenable claims; and (iii) to proceed with a lawsuit in good faith and based on a

84. United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993).
85. *Id.*
86. Renee Knake Jefferson, *Lawyer Lies and Political Speech*, 131 YALE L.J.F. 114, 132 (2021).
87. *See* FED. R. CIV. P. 11(b); MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2020).
88. *See* TARKINGTON, *supra* note 19, at 175, 140–43. Carol Rice Andrews has argued that the improper purpose clause of Rule 11 as to filing complaints is actually unconstitutional because under the Petition Clause, if a case is not legally frivolous, then a litigant has a right to file it. *See* Andrews, *Motive Restrictions*, *supra* note 15.
89. *See* TARKINGTON, *supra* note 19, at 140–43.
90. King v. Whitmer, No. 20-13134, 2021 WL 3771875, at *1 n.2 (E.D. Mich. Aug. 25, 2021).

proper purpose."[91] Again, under the access to justice theory of the First Amendment, lawyers' First Amendment rights are attuned to their role in the system of justice. These basic professional obligations identified by the court in *King*—obligations which exist precisely because the judicial system cannot possibly mete out justice if its rulings are lacking foundations in either fact or law—mirror appropriate limitations on a lawyer's First Amendment rights in court proceedings.

In *King* and *O'Rourke*, attorneys were sanctioned because courts found that they were "proffering claims not backed by law; proffering claims not backed by evidence (but instead, speculation, conjecture, and unwarranted suspicion); proffering factual allegations and claims without engaging in the required prefiling inquiry; and dragging out these proceedings even after they acknowledged that it was too late to attain the relief sought."[92] In both *King* and *O'Rourke*, the attorneys asserted claims that were not legally cognizable—including claims that were not justiciable[93] and claims against parties who were immune[94] or otherwise not subject to the court's jurisdiction.[95] In *O'Rourke*, the plaintiffs filed a class action lawsuit

91. *Id.*

92. *Id.* at *1.

93. *See* O'Rourke v. Dominion Voting Sys., Inc., No. 20-cv-03747, 2021 WL 3400671, at *24 (D. Colo. Aug. 3, 2021) ("[T]here was no good faith basis for believing or asserting that Plaintiffs had standing to bring the claims they did."); *King*, 2021 WL 3771875, at *20. The *King* court explained that "all of Plaintiffs' claims were barred by the doctrines of mootness, laches, and standing, as well as Eleventh Amendment immunity." It elaborated:

> Plaintiffs asked this Court to enjoin the State Defendants from sending Michigan's certified results to the Electoral College; but as reported publicly, Governor Whitmer had already done so before Plaintiffs filed this lawsuit. Plaintiffs sought the impoundment of all voting machines in Michigan; however, those machines are owned and maintained by Michigan's local governments, which are not parties to this lawsuit. Plaintiffs demanded the recount of absentee ballots, but granting such relief would have been contrary to Michigan law as the deadline for requesting and completing a recount already had passed by the time Plaintiffs filed suit. Further, a recount may be requested only by a candidate. And while Plaintiffs requested the above relief, their ultimate goal was the decertification of Michigan's presidential election results and the certification of the losing candidate as the winner—relief not "warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."

Id. (citations omitted).

94. *King*, 2021 WL 3771875, at *20 (noting that claims were barred by Eleventh Amendment immunity).

95. *O'Rourke*, 2021 WL 3400671, at *9–10.

allegedly on behalf of "160 million American registered voters" in Colorado federal court and alleged "a vast conspiracy between four governors, secretaries of state, and various election officials of Michigan, Wisconsin, Pennsylvania and Georgia" in addition to Dominion Voting Systems, Facebook, and others.[96] They sought a determination "that the actions of multiple state legislatures, municipalities, and state courts in the conduct of the 2020 election should be declared legal nullities" and sought relief in the form of damages of 160 billion dollars at a "nominal amount of $1,000 per registered voter."[97] The Court imposed sanctions in part because there was "no plausible good faith justification for the assertion of personal jurisdiction."[98] Elaborating, the court chided:

> It should have been as obvious to Plaintiffs' counsel as it would be to a first-year civil procedure student that there was no legal or factual basis to assert personal jurisdiction *in Colorado* for actions taken by sister states' governors, secretaries of state, or other election officials, in those officials' home states.[99]

Similarly, in both *King* and *O'Rourke*, the courts imposed sanctions in part due to the lawyers' failure to conduct "an inquiry reasonable under the circumstances"[100] into the factual and legal bases for the lawsuit. In *O'Rourke*, the court noted that the attorneys "cut and paste" allegations and affidavits from other failed lawsuits contesting the 2020 election without even bothering to speak with anyone about the basis or accuracy of those allegations.[101] Similarly, in *King*, plaintiff's lawyers failed to speak with

96. *Id.* at *2.
97. *Id.* at *3.
98. *Id.* at *10, *25.
99. *Id.* at *9; *see also id.* ("This Court could exercise personal jurisdiction over them only if the State Official Defendants had purposefully directed activity toward Colorado and the injuries alleged in this case related to that targeted activity."); *id.* at *10 ("The administration of elections in Michigan, Georgia, Pennsylvania, or Wisconsin is not, and could not conceivably be found to be, 'activity directed' at Colorado . . . . Plaintiff's counsel could cite no case in United States legal history where a state official had been sued successfully in the federal court of another state for on-the-job actions taken in the official's home state.")
100. FED. R. CIV. P. 11(b).
101. *O'Rourke*, 2021 WL 3400671, at *26 ("Plaintiffs' counsel spoke to no one."); *id.* at *29 ("Plaintiffs' counsel picked only the information, frequently from dubious sources, that supported their conspiracy theory, ignoring contrary available evidence, including statements from courts and

affiants to address "speculation-filled" gaps.[102] Commenting on the lawyers' failure to undertake reasonable diligence, the *King* court quipped that lawyers "may not bury their heads in the sand and thereafter make affirmative proclamations about what occurred above ground. In such cases, ignorance is not bliss—it is sanctionable."[103] Additionally, in both *King* and *O'Rourke*, attorneys submitted affidavits that on their face demonstrated the affiants had zero personal knowledge of fraud, illegality, or other irregularities, and were entirely based on speculation, rumors, and suspicion.[104]

The attorneys in both *King* and *O'Rourke* could not show a reasonable basis in fact or law for their lawsuits, nor did they conduct a reasonable inquiry into the legal and factual grounds prior to filing suit. Thus, sanctions were warranted under Federal Rule of Civil Procedure 11 and discipline would be appropriate under Model Rule of Professional Conduct 3.1. The First Amendment does not stand in the way of such sanctions because attorneys' rights are attuned to their role in and obligations to the justice system.

In contrast to the *King* and *O'Rourke* lawyers are examples of lawyers[105] who refused to file complaints or other papers in court that were frivolous

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nonpartisan government agencies. They did not take any independent steps to verify the accuracy of the information by talking to actual human beings.")

102. King v. Whitmer, No. 20-13134, 2021 WL 3771875, at *28 (E.D. Mich. Aug. 25, 2021) ("[N]ot a single member of Plaintiffs' legal team spoke with Carone to fill in these speculation-filled gaps before using her affidavit to support the allegation that tens of thousands of votes for President Biden were fraudulently added."); *id.* at *29 ("The Court then asked: '[D]id anyone inquire as to whether or not [the affiant] Bomer actually saw someone change a vote?' The Court was met with silence." (first alteration in original) (citations omitted)).

103. *Id.* at *30.

104. Both courts included excerpts from these affidavits, which are worth the read. *See O'Rourke*, 2021 WL 3400671, at *4 (quoting excerpts from affidavits and concluding that affiants have "no first-person knowledge whatsoever of any election malfeasance nor any evidence, direct or indirect that [their] own vote[s] [were] not counted or [were] inappropriately discounted"); *id.* at 28 (noting that attorneys added "[a]ffidavits from one hundred fifty new plaintiffs who lacked personal knowledge of any election fraud or conspiracy between Defendants"); *King*, 2021 WL 3771875, at *26–30 (excerpting affidavits that failed to show any personal knowledge of fraud or illegality and calling one affidavit "a masterclass on making conjectural leaps and bounds").

105. On March 1, 2022, the Texas Commission for Lawyer Discipline instituted a disciplinary action against Sidney Powell for violating the Texas analog to Model Rule 3.1, among other rules, for filing lawsuits in multiple federal courts alleging that election fraud required the results be overturned. The Commission contends that she "had no reasonable basis to believe the lawsuits she filed were not frivolous." *Commission for Lawyer Discipline v. Powell*, DC-22-02562, *Original Disciplinary Petition*, at 3 (Tex. Dist. Ct. Mar. 1, 2022) https://www.jurist.org/news/wp-

or fraudulent. At the DOJ, Rosen, Donoghue, and Solicitor General Jeffrey Wall refused President Trump's urging in late December 2020 to file a draft "bill of complaint . . . under the Supreme Court's original jurisdiction and against the states of Pennsylvania, Georgia, Michigan, Wisconsin, Arizona, and Nevada," contending that the states had violated the Electors Clause and the Fourteenth Amendment and asking the Court to "enjoin the state from using the 2020 election results to appoint electors."[106] The Complaint had been drafted by private attorney Kurt B. Olsen, who was working with Trump and had previously assisted Texas Attorney General Ken Paxton on Texas's failed Supreme Court lawsuit to overturn election results in certain states—a suit that had been dismissed on December 11, 2020.[107] Despite pressure from Trump over several days, the DOJ officials refused to file the action, concluding "there is no legal basis to bring this lawsuit," that the "DOJ could not file an original Supreme Court action for the benefit of a political candidate," and there was no "general cause of action" for the DOJ to contest the outcome of an election.[108]

In addition to DOJ lawyers who refused to file frivolous suits, a number of law firms and private attorneys who initially filed election suits on behalf of the Trump campaign ended up withdrawing. Those withdrawing included Snell & Wilmer, Porter Wright Morris & Arthur, and private attorneys Linda A. Kerns, John Scott, and Douglas Bryan Hughes.[109]

C. Pretrial Publicity and Non-Court Hearings

Although frivolous court filings themselves initially gave a mirage of credibility to Trump's claims of election fraud, they ultimately failed to shore up the Big Lie as court after court dismissed the cases. By January 2, 2021, the Trump campaign had lost nearly sixty cases before ninety

content/uploads/sites/4/2022/03/Comm-for-Lawyr-Discip-v-Powell.pdf [https://perma.cc/53XZ-Q8Z6].

106. SUBVERTING JUSTICE, *supra* note 57, at 24.

107. *Id.* at 25.

108. *Id.* at 24–28.

109. Morgan Chalfant, *Three Attorneys Withdraw from Representing Trump Campaign in Pennsylvania*, THE HILL (Nov. 16, 2020, 7:49 PM), https://thehill.com/homenews/campaign/526239-three-attorneys-withdraw-from-representing-trump-campaign-in-pennsylvania [https://perma.cc/2CAP-UKAD]; David Thomas, *Snell & Wilmer Withdraws from Election Lawsuit as Trump Contests Arizona Results*, REUTERS (Nov. 11, 2020, 6:03 PM), https://www.reuters.com/article/snell-maricopa-idUSL1N2HY005 [https://perma.cc/Y6KL-H5DB].

judges—including Republican and Trump-appointed judges.[110] But despite these losses, Trump—through his attorneys—used pretrial (and post-trial) publicity to convince his supporters that the election was stolen.

Trump himself stated that he needed attorneys who would go on TV.[111] And there were lawyers willing to do this for Trump. Giuliani, Ellis, and Powell all made major media appearances, especially on right-wing media sources. Powell claimed in an interview with Lou Dobbs that she was going to "release the Kraken"—analogizing her forthcoming lawsuits to a mythical sea monster—and prove that "President Trump won this election in a landslide," explaining that she was "talking about hundreds of thousands of votes."[112] A YouTube video of Powell's interview with Dobbs received over 1.3 million views in just four days, and the phrase "Release the Kraken" trended on Twitter.[113] So what did Powell actually prove in her "Kraken" lawsuits? Well, all were dismissed, and one of them has already been discussed in this Article—the *King v. Whitmer* lawsuit, for which Powell, Wood, and other lawyers were sanctioned under Rule 11 because the lawsuit lacked a reasonable basis in law or fact.[114] Importantly, what Powell was announcing to the public in media appearances did not reflect at all what she could actually present in court.[115]

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110. WOODWARD & COSTA, *supra* note 1, at 214.

111. As reported in *Peril*, Trump complained to his campaign and White House lawyers on December 18: "I need lawyers on TV. I need people who go on TV. Sidney [Powell] goes on TV. Rudy [Giuliani] goes on TV." *Id.* at 195.

112. Davey Alba, *'Release the Kraken,' a Catchphrase for Unfounded Conspiracy theory, Trends on Twitter*, N.Y. TIMES (Nov. 17, 2020, 1:51 PM), https://www.nytimes.com/2020/11/17/technology/release-the-kraken-a-catchphrase-for-unfounded-conspiracy-theory-trends-on-twitter.html [https://perma.cc/MYH6-625G].

113. *Id.*

114. Erin Snodgrass, *Judge Orders Sidney Powell, Lin Wood, and Other "Kraken" Lawyers to Pay More Than $175,000 in Legal Fees to Michigan Officials*, BUS. INSIDER (Dec. 2, 2021, 8:17 PM), https://www.businessinsider.com/judge-orders-kraken-lawyers-to-pay-175000-to-michigan-officials-2021-12 [https://perma.cc/9Q8T-VBZX].

115. *See also* King v. Whitmer, No. 20-13134, 2021 WL 3771875, at *35 (E.D. Mich. Aug. 25, 2021) (noting that in response to a defamation suit by Dominion, Powell backtracked and argued that no reasonable person would take her statements as factual, to which the *King* court stated: "It is not acceptable to support a lawsuit with opinions, which counsel herself claims no reasonable person would accept as fact and which were 'inexact,' 'exaggerate[ed],' and 'hyperbole.'"); Nicholas Reimann, *"Kraken Cracks Under Pressure": GA Secretary of State Rips Sidney Powell After She Ditches Voter Fraud Fight*, FORBES (Mar. 23, 2021, 1:46 PM), https://www.forbes.com/sites/nicholasreimann/2021/03/23/kraken-cracks-under-pressure-ga-secretary-of-state-rips-sidney-powell-after-she-ditches-voter-fraud-fight/.

Similarly, while Trump's claims and "evidence" of fraud and corruption were being rejected by courts, Giuliani and Ellis held public "hearings" and presented "evidence" to the public outside of the courtroom,[116] where the rules of evidence do not apply, witnesses are generally unsworn, and, unlike the *King* and *O'Rourke* cases,[117] there is no judge to point out that that the claims are legally frivolous or that the "witnesses" plainly have no personal relevant knowledge. Giuliani explained the purpose of these "hearings": "It's in everyone's interest to have a full vetting of election irregularities and fraud . . . . And the only way to do this is with public hearings, complete with witnesses, videos, pictures and other evidence of illegalities from the November 3rd election."[118] Indeed, at the very time that Giuliani was pushing fraud at "hearings" to the public in Pennsylvania, he affirmed to a Pennsylvania federal court that "this is not a fraud case."[119]

Attorneys have a First Amendment right to engage in pretrial publicity. I have previously focused my research on pretrial publicity in the criminal context, where I argued criminal defense attorneys (with client permission) have a robust First Amendment right to engage in pretrial publicity, but prosecutors, as representatives of an impartial government and in light of the presumption of innocence, have limited First Amendment rights to engage in pretrial publicity—largely limited to the right to respond to defense-initiated publicity.[120] For civil cases, where there is no presumption

116. *See, e.g.*, SUBVERTING JUSTICE, *supra* note 57, at 13, 26, 39–40, A-1 to A-2 (discussing Giuliani's claims at "so-called election-integrity hearings in Michigan and other states" and the debunking of such claims); *see In re* Giuliani, 146 N.Y.S.3d 266, 272–280 (App. Div. 2021) (reviewing numerous false statements and claims made in various press conferences, media appearances, and "hearings" before groups of legislators from various states at hotels and other venues).

117. *See supra* note 104 and accompanying text (reviewing *King* and *O'Rourke* courts' assessments of affidavits).

118. *Trump Phones in False Claims at Pennsylvania Senate Committee Hearing on Voting "Irregularities,"* CBS NEWS (Nov. 25, 2020, 5:08 PM), https://www.cbsnews.com/news/trump-giuliani-gettysburg-pennsylvania-hearing-election-issues-alleged-irregularities-live-stream-today-2020-11-25/ [https://perma.cc/47F8-PDNB].

119. *See, e.g.*, Lisa Lerer, *Giuliani in Public: "It's a Fraud." Giuliani in Court: "This Is Not a Fraud Case."* N.Y. TIMES (Nov. 18, 2020), https://www.nytimes.com/2020/11/18/us/politics/trump-giuliani-voter-fraud.html [https://perma.cc/CBU9-7J5S]; *see also* Tessa Berenson, *Donald Trump and His Lawyers Are Making Sweeping Allegations of Voter Fraud in Public. In Court, They Say No Such Thing*, TIME (Nov. 20, 2020, 3:13 PM), https://time.com/5914377/donald-trump-no-evidence-fraud/ [https://perma.cc/73LG-FREZ].

120. *See* Margaret Tarkington, *Lost in the Compromise: Free Speech, Criminal Justice, and Attorney Pretrial Publicity*, 66 FLA. L. REV. 1873 (2014); TARKINGTON, *supra* note 19, at 202–39.

of innocence, no constitutional right to counsel, and cases are proven at a preponderance level, I previously argued attorneys (with client consent due to confidentiality duties) have a First Amendment right to engage in pretrial publicity, but can be prohibited from making knowing or reckless false statements of fact or law.[121] Additionally, courts can enter protective orders prohibiting pretrial publicity of nonpublic materials that were produced through the court's compulsory processes and not filed or disclosed in open court, pursuant to *Seattle Times v. Rhinehart*.[122]

The context of the Big Lie has made me reconsider my views on pretrial publicity in civil cases. To what extent can lawyers use "the court of public opinion" in conjunction or competition with what they have filed in civil court cases? As I previously maintained, lawyers do not have a First Amendment right to make knowingly false statements of fact or law relating to a case in which they are serving as a lawyer.[123] Yet Trump's attorneys—most notably Giuliani, Ellis, and Powell—used pretrial publicity to do just that to create a public mirage of legitimacy for Trump's claim of election fraud despite those allegations not making it past the nonfrivolous stage in actual court proceedings. That mirage survives for his supporters to this day, who believe in an illusory wealth of "evidence" that Giuliani and others produced at election integrity "hearings" out of court, press conferences, and other media appearances. This pervasive publicity has led to a decent portion of the public (over 65% of Republicans) believing that Trump was defrauded out of the election,[124] and, correspondingly, that the judiciary

121. TARKINGTON, *supra* note 19, at 239–42.

122. *See id.* at 240–41 (discussing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984)).

123. *See id. But see* Bruce Green & Rebecca Roiphe, *Lawyers, Lies, and the First Amendment*, 69 WASH. U. J.L. & POL'Y 37, 42, 66 (2022) (arguing that for lawyer lies in political contexts, "lawyers who have told deliberate falsehoods in political discourse with the intent to deceive their public audience" should not be sanctioned unless "the lawyer's speech would undermine a judicial proceeding, harm a client or third party to a proceeding, or when the words demonstrate that the lawyer is unfit to practice"); Knake Jefferson, *supra* note 86, at 140 (arguing that while there are contexts where lawyers could be allowed to lie, that given what happened in the 2020 election, attorneys can and should be punished for "publicly disseminat[ing] lies about election results that would not withstand scrutiny in the courthouse").

124. An NPR/*PBS NewsHour*/Marist poll reported on November 1, 2021—almost exactly a year after the 2020 election—found that of those surveyed 68% of Republicans believed that the 2020 election was "rigged" and that "there were real cases of fraud that changed the results." *See* Dominico Montanaro, *Most Americans Trust Elections Are Fair but Sharp Divides Exist, a New Poll Finds*, NPR (Nov. 1, 2021, 5:01 AM), https://www.npr.org/2021/11/01/1050291610/most-americans-trust-elections-are-fair-but-sharp-divides-exist-a-new-poll-finds [https://perma.cc/KYF5-RNFH]; *see also* Caitlin Dickson, *Poll: Two-Thirds of Republicans Still Think the 2020 Election Was Rigged*, YAHOO! NEWS (Aug. 4,

didn't do what was just, dismissed cases of election fraud that should have gone forward, and allowed an unelected imposter to become president.

In the *King* case, the court stated that while attorneys could be punished for their statements in court proceedings, nevertheless "[p]laintiffs' counsel's politically motivated accusations, allegations, and gamesmanship may be protected by the First Amendment when posted on Twitter, shared on Telegram, or repeated on television."[125] But is that so? Should it be? Should the First Amendment protect a lawyer making public statements related to claims the lawyer filed in court that would be sanctionable if made in the court proceeding itself?

Under the access to justice theory of lawyer First Amendment rights, we must consider pretrial publicity in civil cases—both as to the extent that it is protected and the extent that it can be limited by state regulation—in terms of its relationship to the role of the attorney. Pretrial publicity is essential to the role of the attorney in our system of justice because it keeps the public informed about the judicial process, which should not be secretive. One need only consider the historic secret courts of the Inquisition or the Star Chamber to understand the importance of public knowledge and commentary regarding the actions of the judiciary.[126] As the Supreme Court explained in recognizing open courts and public access to court proceedings in *Richmond Newspapers, Inc. v. Virginia*, "the value in open justice" is not just "therapeutic" but is "the keystone"—for "[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account."[127] Indeed,

> [t]he open trial . . . plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have

2021), https://news.yahoo.com/poll-two-thirds-of-republicans-still-think-the-2020-election-was-rigged-165934695.html [https://perma.cc/D7TS-K9XP] (reporting outcome of different poll conducted in late July and early August 2021 concluding that "66 percent of Republicans continue to insist that 'the election was rigged and stolen from Trump'").

125. King v. Whitmer, No. 20-13134, 2021 WL 3771875, at *38 (E.D. Mich. Aug. 25, 2021).

126. *In re* Oliver, 333 U.S. 257, 268–69, 269 n.22 (1948) ("The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet." (footnotes omitted)).

127. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (quoting J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

> confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known.[128]

Nevertheless, deviations from established procedures often will only "become known" if attorneys publicize and explain them. The general public lacks the specialized knowledge to understand much of what takes place in a courtroom. Further, the vast majority of the time, no one other than attorneys attends run-of-the-mill courtroom proceedings. So it is attorneys who have both the exposure and the specialized knowledge to provide accurate public commentary on what occurs in court proceedings.[129]

Thus, the overarching rationale for allowing attorneys to engage in pretrial publicity and present their case to "the court of public opinion" is the core First Amendment interest in full and free discussion as to matters of public concern, and, especially, as to the workings of government in a democratic system. That interest—public scrutiny and discussion of public officials and institutions—is the core purpose underlying the First Amendment itself, as recognized in *New York Times v. Sullivan*.[130] A lawyer should be able to raise before the public what occurs in court proceedings so that the public is aware of problems and can take appropriate democratic corrective action. This is particularly true given that nearly all states elect some or all of their judiciary—either initially and/or through retention elections.[131] Having openness regarding what is occurring in court proceedings is key to maintaining a just judicial branch. And, as noted above, while having open courts and access to court filings is the primary method for this check on judicial power, the ability of attorneys to comment

128. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984) (emphasis in original).

129. I am not concerned that recognizing a First Amendment right to pretrial publicity by lawyers in civil matters will open the floodgates. Importantly, attorneys who engage in pretrial publicity must have client consent to do so, according to the duty of confidentiality. Further, both attorneys and clients in civil cases understand the settlement value found in confidentiality. Thus, in a great many cases, it will be in the client's interests to keep proceedings relatively confidential and not engage in pretrial publicity or call attention to one's civil case.

130. 376 U.S. 254, 275 (1964) ("The right of free public discussion of the stewardship of public officials was . . . a fundamental principle of the American form of government.").

131. *Judicial Election Methods by State*, BALLOTPEDIA, https://ballotpedia.org/Judicial_election_methods_by_state [https://perma.cc/CCP3-WDV4] (showing that only seven states "do not elect any judges by popular election").

on what occurs is also essential for providing informed commentary on the judicial branch.

Nevertheless, the recognition of even a robust First Amendment right to public commentary for attorneys in pending cases does not mean that there are no appropriate limits on that right. Again, under the access to justice theory of attorney First Amendment rights, lawyers can be prohibited from speech that undermines their role in the system of justice. In the context of pretrial publicity in civil matters, it harms the system of justice to allow attorneys to make public statements that they know to be false or are reckless as to truth. Erwin Chemerinsky argued that the *New York Times v. Sullivan* standard should apply to pretrial publicity, given the importance of attorney commentary on matters of central public concern—the workings of our judicial system.[132] Despite Chemerinsky's arguments, the Supreme Court has held that states can impose greater restrictions on attorney pretrial publicity than what would be protected by the *Sullivan* standard, and upheld the standard found in current Model Rule of Professional Conduct 3.6, which prohibits attorneys from engaging in pretrial publicity that has "a substantial likelihood of prejudicing an adjudicative proceeding."[133]

But prejudicing the actual adjudicative proceeding isn't the only harm that can flow from attorney pretrial publicity, especially from deceptive pretrial publicity. The pretrial publicity from Trump lawyers was itself a method to commit a fraud on the public—to convince the public that the election was stolen, that there was "evidence" of this steal, and that the courts were nevertheless turning a blind eye and allowing the steal to take place. This is particularly true of the "election integrity hearings"—where Giuliani and others claimed to have numerous affidavits and other evidence of election fraud. In fact, as became clear from the actual court cases, the

132. I disagree with Chemerinsky, particularly as to the criminal context. The prosecution should not have a right to engage in pretrial publicity and undermine the presumption of innocence and the constitutional rights of the defendant. *See* TARKINGTON, *supra* note 19, at 202–39.

133. Gentile v. State Bar of Nev., 501 U.S. 1030, 1033, 1057–58 (1991). Problematically, Model Rule 3.6 does not differentiate between criminal and civil proceedings, but the roles of lawyers in each context are markedly different. In the criminal context alone, the pretrial publicity rights of the prosecutor must be considered separately from those of the defense attorney, given their differing roles in the system of justice and the constitutional rights of the accused. Of course, in the civil context, lawyers also play a different role in the system of justice than either the prosecutor or the criminal defense attorney, calling for a different analysis of First Amendment rights under the access to justice theory, which attunes the lawyers' rights to their role in the justice system. *See* TARKINGTON, *supra* note 19, at 202–42.

affidavits and evidence proffered were seriously wanting, inadmissible, and sometimes even sanctionable, including affidavits that facially were not made upon personal knowledge.[134] This same "evidence" was rejected in courts because it lacked the requisite factual foundation and could not get past the Rule 11 threshold.

An additional complication arises from the reality that punishing lawyers only for making knowing falsehoods to the public is difficult and costly given that it requires that the attorney have actual knowledge of the falsity and that attorney discipline generally must be proven by clear and convincing evidence. Indeed, one criticism of the New York decision issuing the interim suspension of Giuliani was that the court found that Giuliani knew, or must have known, that what he said was false, yet the court had not held an evidentiary hearing. The New York Appellate Division worked around that problem by creating a shifting burden whereby if the commission had established a "prima facie case" and "sustained its burden of proving that respondent made knowing false and misleading factual statements to support his claim that the presidential election was stolen from his client" then Giuliani had to "demonstrate that there is some legitimate dispute about whether the statement is false or whether the statement was made by him without knowledge it was false."[135] Giuliani had to provide particularized documentary support to refute that he did not know the statements were false.[136] Normally, a disciplinary commission will have to prove by clear and convincing evidence that the attorney had actual knowledge that what he said was false.[137]

There is a further problem that arises out of the modern post-truth era—one specifically pushed by Trump throughout his presidency with his emphasis on both "fake news" and "alternate facts"—lawyers may subjectively believe the Big Lie. The lawyers in both *King* and *O'Rourke*

134. *See supra* note 104 and accompanying text (reviewing the affidavits filed in the *King* and *O'Rourke* cases).

135. *In re* Giuliani, 146 N.Y.S.3d 266, 271 (App. Div. 2021).

136. *See id.* at 275 ("Respondent's general claim, without providing this Court with any documentary support, that he relied on 'hundreds of pages of affidavits and declarations in [respondent's] possession that document gross irregularities' will not suffice to controvert the specific findings that he knowingly made the false statements that are particularized below.").

137. MODEL RULES OF PRO. CONDUCT r. 1.0(f) (AM. BAR ASS'N 2020). The attorney's knowledge can be inferred from the circumstances. *Id.* Notably, the New York court does not disagree that this is what is required, but their method in large part shifted the burden onto Giuliani to controvert that he knew the statements were false. *See Giuliani*, 146 N.Y.S.3d at 271.

maintained that they believed their allegations.[138] However, they were still sanctioned under Rule 11 for their in-court advocacy because they failed to undertake an investigation reasonable under the circumstances and their allegations lacked any reasonable basis in law or fact. The *King* court made an important observation as to why "belief" cannot be the measure. The court explained, "As officers of the court, Plaintiffs' counsel had an obligation to do more than repeat opinions and beliefs, even if shared by millions. Something does not become plausible simply because it is repeated many times by many people."[139] In a footnote, the court elaborates: "This is a lesson that some of the darkest periods of history have taught us."[140] And, in fact, history does provide harrowing examples—such as the fact that many Germans during WWII believed that Jews caused their country's problems, or, in earlier times, that many people believed that women were witches who should be burned to death. Notably, lawyers in high-profile pending cases can in fact influence popular opinion about both the underlying factual bases for the case and the integrity of court processes. Lawyers are readily viewed as experts with the inside scoop on what is really going on (even if they cannot fully disclose given their duty of confidentiality). The shocking level at which much of the public still believes that the 2020 election was fraudulently stolen from Trump—especially given the dismal reception of the claim in actual courts and the utter lack of evidence of widespread fraud after a year of recounts and scrutiny—shows how powerful publicity and "the court of public opinion" really are. Giuliani, Powell, Ellis, and Wood may have lost in the courts of law, but as to members of the Republican Party, they succeeded in convincing the court of public opinion.[141]

138. King v. Whitmer, No. 20-13134, 2021 WL 3771875, at *24 (E.D. Mich. Aug. 25, 2021) ("Plaintiffs' attorneys argue that they genuinely believed the factual allegations in this lawsuit . . . . Of course, an 'empty-head' but 'pure-heart' does not justify lodging patently unsupported factual assertions in a court proceeding."); O'Rourke v. Dominion Voting Sys., Inc., No. 20-cv-03747, 2021 WL 3400671, at 11 (D. Colo. Aug. 3, 2021) ("Plaintiffs' counsel insisted at oral argument that they genuinely believe the factual allegations and legal contentions in the Complaint. But 'belief' alone cannot form the foundation for a lawsuit. An 'empty-head' but 'pure-heart' is no justification for patently frivolous arguments or factual assertions. The belief must be a 'substantiated belief.'")

139. *King*, 2021 WL 3771875, at *35.

140. *Id.* at *35 n.78.

141. *See supra* note 124 and accompanying text (reviewing polls showing that over 65% of Republicans believe that that the 2020 election was rigged and stolen from Trump).

Given this reality, the question becomes whether it frustrates the lawyer's role in the system of justice to allow lawyers in pending civil cases to make public statements related to the case that would not be permissible in the case itself. If an attorney for a party in a pending judicial proceeding is going to make statements to the press and to the public indicating that the courts are ignoring evidence (such as fraud) or are improperly dismissing a case, etc., the attorney must have a reasonable basis in fact for that statement and for the alleged "evidence" that the court is purportedly ignoring. If an attorney decides to try a case both in the court of public opinion and before the courts of law, the attorney should not be able to undermine public trust in the judicial system by presenting to the public "evidence" and allegations that do not have a reasonable basis in fact or law and, thus, that the lawyer is not presenting (or could be sanctioned for presenting) in court.

It undermines the role of the lawyer in the system of justice to have lawyers on a pending case present to the public unfounded statements related to that case—statements that could not form a factual or legal basis for the resolution of that case. Thus, under the access to justice theory, the First Amendment is not an impediment to regulation that would prohibit lawyers representing clients in civil cases from engaging in publicity related to that case without a reasonable basis in law or fact for their statements. Under this view, lawyers who are attorneys in pending civil cases have robust First Amendment rights to make public statements about cases, with client consent—and even try their cases "in the court of public opinion"—but they must have a reasonable basis in fact and law for their public statements related to the case. Such a restriction would mirror and incorporate the same very low threshold as Rule 11. To be punishable, the statements must be without a basis in fact or law. Lawyers who are being punished for such statements can avoid punishment by demonstrating a reasonable basis in fact or law for their statements. This approach also avoids the knotty issue of proving the subjective intent of the lawyer—whether the lawyer was engaged in knowing falsehoods. Additionally, it appropriately recognizes that it is imperative to the integrity of adjudicative proceedings—and to assessing whether such proceedings are just and fair—that allegations and claims have a basis in fact and law.

In the case of the non-court "hearings" and media appearances of Giuliani, Powell, Ellis, and others, the publicity was itself being used to defraud the public by proffering to the public "evidence" that did not have

a reasonable basis in fact, would not have been admissible in court, and was often flat out false or misleading. The point of these pervasive media statements and appearances was to convince the public that the election had been stolen—and thus the publicity itself worked a fraud on the public, one that undermined faith both in the election results and in the integrity of the judiciary. An attorney cannot participate in such a fraud upon the people in order to achieve a fraudulent result for his client (in this case overturning the election).[142] Consequently, the publicity was itself an additional method of assisting Trump in achieving an illegal and fraudulent end, in violation of Model Rule 1.2(d). The First Amendment does not protect the attorney from discipline for such actions.

D. Incitement at the January 6 "Save America" Rally

The events of January 6, 2021, are still being investigated and much is unknown, including how much of what occurred—especially as to the actual breach of the Capitol—was planned in advance and by whom.[143]

142. In a court filing dated March 8, 2022, the Office of General Counsel for the U.S. House of Representatives alleged that Eastman and Trump were engaged in both (1) a criminal conspiracy to defraud the United States and (2) common law fraud on the public at large and on various state and federal officials. The filing specifically addressed whether Eastman was required to turn over to Congress certain documents that he alleges are privileged, with Congress arguing that any privilege is vitiated by the crime-fraud exception. Although the context here is the scope of lawyer First Amendment rights rather than the crime-fraud exception to the attorney-client privilege, the filing contains allegations setting forth a legal case that Eastman and Trump were working together to defraud both the United States and the populace. *See Eastman v. Thompson*, Case No. 8:22-cv-00099-DOC-DFM, *Congressional Defendants' Brief in Opposition to Plaintiff's Privilege Assertions* at 41–52 (C.D. Cal. Mar. 8, 2022), https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022.03.02%20%28ECF%20160%29%20Opposition%20to%20Plaintiff%27s%20Privilege%20Claims%20%28Redacted%29.pdf.

143. As of the writing of this Article, the Senate Judiciary Committee has been investigating the January 6 attack, as has a select committee from the House of Representatives, consisting of nine House members. Both bodies are still conducting investigations, although they have released interim reports and statements. *See, e.g.*, Barbara Sprunt, *Here Are the 9 Lawmakers Investigating the Jan. 6 Capitol Attack*, NPR (July 27, 2021, 5:00 AM), https://www.npr.org/2021/07/27/1020713409/here-are-the-9-lawmakers-investigating-the-jan-6-capitol-attack [https://perma.cc/KJD5-NPLQ]; *January 6 Storming of the Capitol*, SCHAFFER LIBR. LIBGUIDES, https://libguides.union.edu/c.php?g=1126166 [https://perma.cc/JR6G-MS7X]; Press Release, S. Comm. on the Judiciary, Following 8 Month Investigation, Senate Judiciary Committee Releases Report on Donald Trump's Scheme to Pressure DOJ & Overturn the 2020 Election (Oct. 7, 2021), https://www.judiciary.senate.gov/press/dem/releases/following-8-month-investigation-senate-judiciary-committee-releases-report-on-donald-trumps-scheme-to-pressure-doj-and-overturn-the-2020-election [https://perma.cc/UH3T-AJLA].

Further, on December 13, 2021, it was reported that two of the organizers of the January 6 events were coming forward to provide more information to Congress. Hunter Walker, *Two January 6*

Certainly, it was part of the plan for the day's events that there would be a "Save America Rally" at the Ellipse, starting at 7:00 a.m. with a specific lineup of speakers, a short propaganda film,[144] and concluding with remarks by Donald Trump himself, followed by a march to the Capitol at 1:00 p.m.[145] Donald Trump and other speakers expressly invited the crowd to march to the Capitol. Eric Trump, who spoke earlier in the rally, stated that members of Congress "need to stand up and we need to march on the Capitol today. And we need to stand up for this Country, and we need to stand up for what's right."[146] President Trump, in his remarks, repeatedly invited the crowd to march to the Capitol. In one of those instances, he said: "We have come to

Organizers Are Coming Forward and Naming Names: "We're Turning It All Over," ROLLING STONE (Dec. 13, 2021), https://www.rollingstone.com/politics/politics-features/jan6-rally-trump-2020-election-capitol-congress-gosar-1253392/ [https://perma.cc/ZYY2-9CAY]. At the same time, Steve Bannon is being charged with contempt for refusing to cooperate with the Congressional investigation, as is Mark Meadows. *See* Farnoush Amiri & Mary Clare Jalonick, *House Votes to Hold Mark Meadows in Contempt in Jan. 6 Probe*, AP NEWS (Dec. 15, 2021), https://apnews.com/article/steve-bannon-capitol-siege-subpoenas-mark-meadows-congress-bd6ea8ca859228c89e875e7a7c47317f. Attorneys John Eastman and Jeffrey Clark have both opted to invoke the Fifth Amendment against self-incrimination to avoid testifying. *See* Teri Kanefield, *Trump Election Lie Allies Stone, Eastman, and Clark Plead the Fifth. It Won't Do Much.*, NBC NEWS (Dec. 11, 2021), https://www.nbcnews.com/think/opinion/trump-election-lie-allies-stone-eastman-clark-plead-fifth-it-ncna1285754 [https://perma.cc/XF5F-74BK].

144. The short propaganda video shown at the Ellipse rally is available at https://vimeo.com/508134765 (last visited Mar. 24, 2022).

145. *See* Philip Bump, *When Did the Jan. 6 Rally Become a March to the Capitol?*, WASH. POST (Feb. 10, 2021), https://www.washingtonpost.com/politics/2021/02/10/when-did-jan-6-rally-become-march-capitol/ [https://perma.cc/MB5W-AMJU] (showing that by January 5, the invitations and posts regarding the event showed the separate Ellipse rally beginning at 9:00 am followed by an event at the Capitol at 1:00 pm).

146. There was plenty of rhetoric centered on the word "fight," but the extent to which speakers intended the "fight" to include physical action or just a metaphor for supporting Trump is not evident. For example, Eric Trump said "we will never ever stop fighting"; Lara Trump said, "This fight has only just begun" and "We are in this fight to the bitter end. We are going to take our country back." Kimberly Guilfoyle said "Here's the best news: Look at all of us out here. God-loving, freedom-loving, liberty-loving patriots that will not let them steal this election! . . . We will continue to Stand for President Trump. Stand with him and for this Country. We will not allow the liberals and the democrats to steal our dream or steal our elections." Donald Trump Jr. began his remarks by congratulating everyone on being peaceful, but then states that the gathering "should be a message to all the Republicans who have not been willing to fight. The people who did nothing to stop the steal." He tells them "If you don't fight in the face of glaring irregularities, in statistical impossibilities"—at which point he is interrupted by the crowd chanting "Fight for Trump!" repeatedly. He then makes many other comments telling the crowd to "keep fighting." Video of the entire Ellipse rally is available on C-Span's website. *Rally on Electoral College Vote Certification*, C-SPAN (Jan. 6, 2021), https://www.c-span.org/video/?507744-1/rally-electoral-college-vote-certification (Eric and Lara Trump's comments begin at 1 hour and 46 minutes; Kimberly Guilfoyle's comments start at 1 hour 50 minutes; and Donald Trump Jr.'s comments begin at 1 hour and 53 minutes.).

demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated. I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard." He also repeatedly indicated that if action was not taken "we're going to have somebody in there that should not be in there and our country will be destroyed, and we're not going to stand for that." So, according to Trump, the crowd was there "for one very, very basic and simple reason, to save our democracy"—if Vice President Pence went through with the vote count "we're stuck with a president who lost the election by a lot, and we have to live with that for four more years. We're just not going to let that happen." After exhaustively reviewing (bogus) allegations of massive fraud in the counting of votes in Pennsylvania, Georgia, Wisconsin, Arizona, Nevada, and Michigan, Trump concluded his remarks by stating that rather than accept the results as "most people" would, he knew "[s]omething's really wrong here. . . . And we fight. We fight like hell, and if you don't fight like hell, you're not going to have a country anymore." Then he invited the crowd to go to the Capitol.[147]

Notably, the two speakers prior to Trump were Rudy Giuliani and John Eastman. Ken Paxton, the Attorney General of Texas, also made some brief remarks at the beginning of the rally.[148] Both Giuliani and Eastman are facing potential discipline, based in part on statements they made at the January 6 rally. The referral against Eastman specifically recommends that a disciplinary committee look into his statements made at and his involvement in the January 6 rally.[149] Further, after the insurrection at the Capitol, Eastman retired from Chapman University's Fowler School of Law in response to a letter signed by over 150 members of the faculty and the Board of Trustees demanding that Eastman be "disqualif[ied] . . . from the

147. President Trump's statements have been transcribed. *See* Trump Rally Statements, *supra* note 74. Although he never explains exactly what they will be doing at the Capitol—other than "to try and give our Republicans, the weak ones . . . the kind of pride and boldness that they need to take back our country"—he indicates repeatedly that if the votes are counted by Pence, then there will be an illegitimate president and the country will be destroyed and that they cannot let that happen. *See id.*

148. Paxton touted election cases he had brought in Texas and the U.S. Supreme Court. He said in pertinent part, "And then, we had the opportunity to fight in other states and we sued four states over the ballot fraud and not following the Constitution and not following state law. And we took it directly to the Supreme Court and they should have heard our case. . . . [W]hat we have in President Trump is a fighter. . . . We will not quit fighting. We're Texans, . . . we're Americans, and we're not quitting. God bless you for being here today." *Rally on Electoral College Vote Certification*, *supra* note 146 (Paxton's remarks occur at 1 hour and 40 minutes into the rally.).

149. *See* Letter from Stephen Bundy to George S. Cardona, *supra* note 5, at 23–24.

privilege of teaching law to our students and strip[ped] . . . of the honor of an endowed chair."[150] Eastman released a statement responding to the letter, in which he stated that the faculty members and lawyers on the Board of Trustees "are clearly not well-versed in the constitutional questions at issue," specifically "the 'incitement' exception to the First Amendment's freedom of speech."[151]

The "incitement exception" to which Eastman is referring and relying on comes from *Brandenburg v. Ohio*,[152] where the Supreme Court held that the First Amendment "do[es] not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except* where such advocacy is directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action."[153] The extent to which the *Brandenburg* rule protects Eastman from adverse employment action from a private university, which Chapman is, is not relevant here—but Eastman will likely raise the same argument against the disciplinary referral should it move forward. The relevant question here, then, is whether the *Brandenburg* standard protects attorneys from discipline for publicly advocating "the use of force or law violation" on behalf of a client.

In *Holder v. Humanitarian Law Project*, Justice Breyer argued in dissent that the plaintiffs in that case, including attorneys who wanted to provide lawful nonviolent legal advice to designated foreign terrorist organizations, enjoyed the protection of the *Brandenburg* standard. He explained that the plaintiffs in *Holder* should clearly be protected in providing lawful legal advice to and advocacy on behalf of designated foreign terrorist organizations because, under *Brandenburg*, the First Amendment would protect "pure advocacy *of even the most unlawful activity*—as long as that advocacy is not 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.'"[154]

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150. *See* Michael T. Nietzel, *John Eastman Retires from Chapman University*, FORBES (Jan. 13, 2021), https://www.forbes.com/sites/michaeltnietzel/2021/01/13/john-eastman-retires-from-chapman-university/.

151. John C. Eastman, *John Eastman's Statement on His Retirement from Chapman University's Fowler School of Law*, AM. MIND (Jan. 14, 2021), https://americanmind.org/salvo/john-eastmans-statement-on-his-retirement-from-chapman-university-fowler-school-of-law/ [https://perma.cc/BEF3-HMMT].

152. 395 U.S. 444 (1969) (per curiam).

153. *See id.* at 447 (emphasis added).

154. *See* Holder v. Humanitarian L. Project, 561 U.S. 1, 51 (2010) (Breyer, J., dissenting) (emphasis added) (quoting *Brandenburg*, 395 U.S. at 447).

So is Eastman correct that the *Brandenburg* standard should protect the speakers at the January 6 rally from punishment? *Brandenburg* would be applicable to the public in general, including to Trump and other nonattorneys speaking at the rally. (Notably, given that the speakers at the rally appear to have in fact incited "imminent lawless action," if it were determined that their speech was directed at producing such action, even the lenient *Brandenburg* standard may allow for punishment of their speech.) But Eastman, along with Justice Breyer in his *Holder* dissent, is incorrect that the *Brandenburg* standard is or should be applicable to speech made by attorneys in their capacity as attorneys—including, as at the January 6 rally, advocacy by an attorney on behalf and in furtherance of their client's interests and political goals (overturning the election). The access to justice theory provides core speech protection for attorney speech made on behalf of clients that provides access to justice and the fair administration of the laws. However, it is patently *not* essential to the fair administration of the laws or to the lawyer's role in the justice system to constitutionally protect attorney speech made on a client's behalf that advises people to engage in "even the most unlawful activity,"[155] as allowed under the *Brandenburg* standard. And that is true regardless of whether or not the speech is aimed at or does in fact "incite or produce imminent lawless action."[156] Thus lawyers when engaged in public advocacy on behalf of their clients do not enjoy the benefit of the *Brandenburg* standard. They can and should be punished for advocating that people engage in "unlawful activity."

As lawyers engaged in public advocacy on behalf of President Trump, their client, both Eastman and Giuliani can be punished for advising and assisting in fraudulent, criminal, and illegal conduct at the rally. And the reason this should be so is evident from their brief but significant remarks. Giuliani began his rally remarks by explaining that he and Eastman were

> here just very briefly to make a very important two points. Number one: *every single thing that has been outlined as the plan for today is perfectly legal*. I have Professor Eastman here with me to say a few words about that. He's

155. *Id.*
156. *Brandenburg*, 395 U.S. at 447.

> one of the preeminent constitutional scholars in the United States.[157]

The importance of this introduction to their remarks can hardly be overstated and demonstrates why lawyers, when acting on behalf of or in assistance of a client (which Giuliani and Eastman were doing), should not have the protection afforded by the *Brandenburg* standard. First, as noted above, lawyers can constitutionally be prohibited (as they are under Model Rule 1.2(d)) from advising or assisting fraudulent, criminal, or illegal conduct. Giuliani and Eastman, through their statements to the crowd, assisted Trump in defrauding the crowd into believing that the election was stolen, which prompted them to march on the Capitol. But to the extent that the crowd understood Trump's and others' directions to march to the Capitol to include entering the Capitol to stop the vote counting, Giuliani's opening lines reassure the crowd that any actions they are being asked to take are "perfectly legal." In essence, Giuliani and Eastman are assisting Trump by providing legal advice directly to the crowd. They are advising the crowd that "every single thing that has been outlined as the plan for today is perfectly legal" and that Pence had the power as Vice President to "decide on the validity of these crooked ballots."[158] Trump also touts Eastman's advice to the crowd as proof that Pence, in fact, had the constitutional power and duty to refuse to count the votes and that the crowd could and should go assist. He explains that Eastman is "one of the top constitutional lawyers in our country" who agrees that the election was a "disgrace," and that Pence "has the absolute right" to stop the count.[159]

The presence and participation of the lawyers at the January 6 rally served precisely to give Trump's direction to the crowd to march on the Capitol (as well as the demand that Pence refuse to count the votes) the auspices of legality. The lawyers were there to validate as legally grounded Trump's grievances and his plea for immediate assistance from Pence and

157. Giuliani & Eastman Rally Statements, *supra* note 74 (emphasis added).

158. *Id.*

159. Trump explained to the crowd: "John is one of the most brilliant lawyers in the country, and he looked at this and he said, 'What an absolute disgrace, that this could be happening to our constitution.' He looked at Mike Pence, and I hope Mike is going to do the right thing. I hope so. I hope so because if Mike Pence does the right thing, we win the election. All he has to do. This is from the number one or certainly one of the top constitutional lawyers in our country. He has the absolute right to do it. We're supposed to protect our country, support our country, support our constitution, and protect our constitution." Trump Rally Statements, *supra* note 74.

the crowd—and to convince the crowd that such actions were not only backed by law, but essential to the protection of the Constitution and the salvation of our democracy. In so advising the crowd and thereby assisting Trump, Giuliani and Eastman played a central role in defrauding the public about the election and in working to assist Trump to overturn the election by force.

Indeed, at the rally, both Giuliani and Eastman stated in absolute terms that the election was fraudulent, that states wanted to have their electoral votes rescinded, and that to save our country, the counting had to be stopped. Eastman stated:

> We saw it [allegedly fraudulent electronic voting] happen in real time last night [with the Georgia run-off election], and *it happened on November 3rd as well*. And all we are *demanding of Vice President Pence* is this afternoon at 1:00 he let the legislators of the state [sic] look into this so we get to the bottom of it, and the American people know whether we have control of the direction of our government, or not. *We no longer live in a self governing republic* if we can't get the answer to this question. This is bigger than President Trump. It is the *very essence of our republican form of government*, and *it has to be done*. And anybody that is not willing to stand up to do it, does not deserve to be in the office. It is that simple.[160]

Similarly, Giuliani stated:

> This was the worst election in American history. *This election was stolen in seven states.* They picked states where they have crooked Democratic cities, where they could push everybody around. And *it has to be vindicated to save our republic*. This is bigger than Donald Trump. It's bigger than you and me. It's about these monuments [in D.C.] and what they stand for.[161]

Giuliani's and Eastman's grandiose advice that the election was stolen and that stopping the vote counting was essential to save the Republic could

160. Giuliani & Eastman Rally Statements, *supra* note 74 (emphasis added).
161. *Id.* (emphasis added).

reasonably be understood by those listening to mean that they had to physically interrupt the session of Congress and stop the counting (whether or not it could be done non-violently). This assisted Trump's autocratic bid to overturn the election, as well as advised the crowd to engage in illegal conduct in breaching the Capitol. Tragically, many members of the public who listened to their words and acted on them have since been charged with and even convicted of crimes—despite being assured by Giuliani that "every single thing that has been outlined as the plan for today is perfectly legal." Further, Eastman's and Giuliani's speeches included false and misleading statements in public advocacy on behalf of a client, which can constitutionally be punished or proscribed, as discussed above, and they defrauded the crowd into working toward Trump's goal of overturning the election.

Unlike members of the public, Giuliani and Eastman do not have the protection of the *Brandenburg* standard for their January 6 statements. As lawyers, they are not free to advocate "even the most unlawful activity."[162] Instead, they can and should be held accountable for using their status and clout as lawyers and gatekeepers of the law to advise the crowd of the legitimacy of fraudulent grievances and of purported necessary actions to save constitutional governance—when in fact, they were assisting Trump in overturning a democratic election.

E. Obligations to Report Up, Report Out, or Resign

One of the more hopeful pieces of the story surrounding the Big Lie is the number of attorneys who were willing to resign or withdraw rather than assist Trump. Some resigned or withdrew; others threatened to do so if Trump took certain actions, causing Trump to back down. In addition to the leadership of the DOJ and White House Counsel, listed previously, who stopped Trump from installing Clark by threatening to resign,[163] numerous other attorneys withdrew, resigned, or boldly flouted Trump, leading to their forced resignations (at the threat of being fired). These attorneys include Richard Pilger, Director of the Public Integrity Section's Election Crimes

162. *See* Holder v. Humanitarian L. Project, 561 U.S. 1, 51 (2010) (Breyer, J., dissenting) (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)).

163. *See supra* notes 60–63 and accompanying text.

Branch;[164] Bill Barr;[165] Christopher Krebs;[166] Byung Jim (BJay) Pak, U.S. Attorney for the Northern District of Georgia;[167] Snell & Wilmer; Porter Wright Morris & Arthur; and private attorneys Linda A. Kerns, John Scott, and Douglas Bryan Hughes.[168]

The rules of professional conduct currently list situations in which withdrawal is mandatory, including when continued representation will result in a violation of the rules or other law.[169] Because the Model Rules also prohibit lawyers from advising or assisting a client in fraudulent or criminal conduct, from filing cases that do not have a reasonable basis in law or fact, and from making false statements of material fact or law when communicating with others in the course of a representation, lawyers are required to withdraw from a representation rather than to take any of these actions on behalf of a client.[170] While most of the lawyers who resigned or withdrew from assisting Trump or his campaign in the fallout of the 2020 election did not always pinpoint the precise reasons for that withdrawal, the numerous withdrawals are themselves telling. Lawyers also are required to withdraw if they are fired.[171] Some of the lawyers who withdrew did so because Trump was going to fire them if they did not resign or withdraw on their own.[172] Others used the threat of withdrawal to rein in Trump and keep him from taking actions that would overturn the election—as when most of the DOJ leadership threatened to resign if Trump replaced Rosen with Clark to send out letters from the DOJ to state legislatures asking them to send in alternate slates of electors.[173]

While the First Amendment protects the right of association between attorney and client, the current prohibitions on association (by requiring withdrawal) listed above from the Model Rules comport with appropriate limitations on that right. Lawyers lack a right to use state power (in the form of their license) and associate with clients for the purpose of committing a crime or fraud, filing frivolous suits, or making material misrepresentations

164. *See* SUBVERTING JUSTICE, *supra* note 57, at 12, A-1.
165. *See supra* note 69 and accompanying text.
166. *See supra* note 70 and accompanying text.
167. *See supra* note 71 and accompanying text.
168. *See supra* note 109 and accompanying text.
169. *See* MODEL RULES OF PRO. CONDUCT r. 1.16(a) (AM. BAR ASS'N 2020).
170. *See id.* rr. 1.2(d), 3.1, 4.1.
171. *See id.* r. 1.16(a).
172. For example, that is what happened with BJay Pak. *See supra* note 71.
173. *See supra* notes 60–63 and accompanying text.

of fact or law relating to a representation. In all of those situations, the state can prohibit lawyers from using their licenses to oppress, abuse, deceive, and thereby undermine their role in the system of justice.

Additionally, government lawyers (like those employed by the DOJ) represent an organization—in this case, the United States Government—and under Model Rule of Professional Conduct 1.13, their loyalties and obligations ultimately run to their governmental client, not to individual constituents or officers of that client.[174] Further, Rule 1.13 requires government lawyers to "report up" within an organization regarding violations of law that will harm or be attributed to the organization, and if action is not taken, the rule permits the lawyer to "report out."[175] Comment 9 to the Rule appears to give even more leeway to governmental lawyers in reporting malfeasance up and out than is given to lawyers for nongovernment organizations, explaining that "a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved."[176]

For lawyers employed by the government, this rule is appropriate, and could even be stronger—by actually requiring (and not just permitting) reporting out when the highest authority with power fails to act. For government lawyers, the question of whether confidentiality should prohibit disclosure is easier because their client is the government, and not the individual officer.[177] As James Moliterno has argued, while a private client

174. *See generally* Clark, *supra* note 3 (discussing obligations of DOJ lawyers to the United States rather than to Trump personally). Other commentators to discuss the duties of government lawyers include W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275 (2017); Allan C. Hutchinson, *"In the Public Interest": The Responsibilities and Rights of Government Lawyers*, 10 GERMAN L.J. 981 (2009). *See also* articles written for the October 2018 *Fordham Law Review* Colloquium, *The Varied Roles, Regulation, and Professional Responsibilities of Government Lawyers*. For an overview of the Colloquium, see Bruce A. Green, *Lawyers in Government Service—A Foreword*, 87 FORD. L. REV. 1791 (2019).

175. *See* MODEL RULES OF PRO. CONDUCT r. 1.13(b)–(c) (AM. BAR ASS'N 2020). If the lawyer reports up and the highest authority in the organization fails to take appropriate action and the violation of law is reasonably certain to result in substantial harm to the organization, then the lawyer is permitted, but not required, to report out—to disclose the violation outside of the organization—but only to the extent that it will prevent substantial injury to the organization.

176. *Id.* r. 1.13, cmt. 9 ("[I]n a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances.").

177. James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 TEMP. POL. & C.R.L. REV. 633, 633 (2005) ("Unlike the private entity client, the federal government has a paramount interest in the public good, including the public's right to know about government (the

has "a right to expect her lawyer to maintain confidence about past wrongdoing," the governmental client, "by contrast, *owes* revelation of its own wrongdoing to the public."[178] When government lawyers were asked by Trump to violate their duties to their actual client—the United States Government—the lawyers' obligation to protect the interests of the government were paramount. This obligation is particularly clear in the context of an attempt by a government official to overturn the results of an election that was lost and stay in power illegitimately. The government official is directly harming the integrity and legitimacy of the actual client, yet the lawyer's duties are to the actual client, the Government and, ultimately, the people of the United States.

But what about when an attorney is representing a government official *personally*, especially in an advisory context? There were many lawyers who did not work for or represent the government but instead represented Trump personally in the 2020 election fight. These lawyers included Eastman, Giuliani, Ellis, Powell, Mitchell, and Olsen—did they have any obligation to the public when representing or hired by a government official to advise and assist that official, even though they did not represent the government itself?

When a private attorney is hired to advise or assist a government official, entity, or agency to advise or assist that government official or entity in the use of that official's governmental power, then the attorney is really advising and assisting that officer or entity in their official capacity, and not in their individual capacity. This idea is not entirely novel—others have analogized attorneys' duties when representing the government to representing officers in their official rather than individual capacity, along the lines of an *Ex parte Young* analysis.[179] But those analogies have been in

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entity's conduct), especially its misconduct. The result is a client in whose interest it is for confidentiality to be waived in instances of client misconduct, giving rise to the federal government lawyer's duty to breach confidentiality."); *see also* Roger C. Crampton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291 (1991); Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U.L. REV. 1033 (2007).

178. Moliterno, *supra* note 177, at 636 (emphasis added). Moliterno explains that the reason for confidentiality in the private context is "protecting the client." But "[h]aving a client that wants revelation of certain information alters the confidentiality balance dramatically." "The government has expressed this preference by enacting statutes that either command or encourage revelation of government wrongdoing." *See id.* at 634–36.

179. *Ex parte* Young, 209 U.S. 123 (1908) (allowing for suits for injunctive relief to be brought against state officials in their official capacity despite 11th Amendment immunity); *see, e.g.*, Crampton, *supra* note 177, at 302 (noting that a lawyer working for the government "doesn't represent the officer

the context of identifying the duties of a lawyer who is actually employed by the government, rather than of a private attorney hired by a government official (like Trump) or other government entity to advise or assist that government official or entity. Nevertheless, the analysis works even in the context of a private attorney, at least whenever that private attorney is hired to advise or assist government officers in the exercise of their offices and the government power attendant thereto. That's precisely because the advice given to the officer will very likely be used to shape the future conduct of that officer and the actual use of government power. That government power derives from the people—and is given to the officeholder only while in office. The government power that will be commandeered according to the lawyer's advice or assistance does not "belong" to the officeholder personally—it belongs to the office.

For example, Eastman and Powell advised and assisted Trump in how to use the government power attendant to his office (and even attendant to Pence's office). Powell advised Trump that he could and should use his government power to appoint her as a special prosecutor, seize voting machines, and take over the vote count of the election nationally.[180] Eastman advised both Trump and Pence that Pence in his office as Vice President was the "ultimate arbiter" of the election[181] and apparently could refuse to count certified votes in certain states and "gavel[] [in] President Trump as re-elected."[182]

In both cases, the lawyers were not really advising that the person, Donald Trump, had the power to appoint a special prosecutor and take over the national vote count, or that the person, Mike Pence, had the power to determine the counting (or ignoring) of certified electoral votes. Instead, Powell advised that the President of the United States had and could exercise the power to take over the national vote count. She advised that the *office* holds that power—not just for Trump, but for any President of the United States. Similarly, Eastman advised not just that Pence had the power,

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in the latter's individual capacity," and thus a lawyer who "works for an agency of the executive branch of the Government of the United States" he does not work "for an individual who temporarily occupies one of its offices"); *see also id.* at 302 n.71 (noting that some commentators on government lawyers have analogized to *Ex parte Young*).

180. WOODWARD & COSTA, *supra* note 1, at 193–97.

181. Eastman asserts this claim in both of his memos. *See* Two-Page Eastman Memo, *supra* note 48, at 2; Six-Page Eastman Memo, *supra* note 48, at 6.

182. *See* Two-page Eastman Memo, *supra* note 48, at 2.

but that all Vice Presidents have the power and are the ultimate arbiters of the Electoral College count and can discount the votes of states if they deem it appropriate. The U.S.D.C. for the District of California recently held that Eastman's advice to Trump was *not* a "'good faith interpretation' of the law,"[183] but instead was a "coup in search of a legal theory."[184] The court noted that Eastman had conceded to Pence and his attorney, Greg Jacob, at their January 4 meeting, that the office of the Vice President could not have the power Eastman claimed because "[y]ou would just have the same party win continuously if [the] Vice President had the authority to just declare the winner of every State."[185]

So when a government official hires a private attorney to advise or assist a governmental officer, board, agency, or other entity, regarding the prospective use of government power—even though the private attorney is not technically a government attorney—the attorney ultimately represents and owes duties to that office, board, or agency in its official or governmental capacity, rather than to the individual who holds that office. The attorney is going to be advising or assisting the official as to future conduct and the use of government power, and therefore owes duties to the body politic from whom that governmental power is derived, as well as to the integrity of the particular governmental office or entity. Attorneys so advising a government officer undertake a gatekeeping role to protect against abuse of the power attendant to that office, thus benefiting and protecting the integrity of that office and the functioning and stability of the government.

This understanding of the duties of private attorneys advising government officials about future conduct and the scope of their government powers has implications for confidentiality (and reporting up

183. Eastman v. Thompson, Case No. 8:22-cv-00099-DOC-DFM, 2022 WL 894256, at *24 (C.D. Cal. Mar. 28, 2022) (Order Re Privilege of Documents Dated January 4-7, 2021) (also available at https://www.cacd.uscourts.gov/sites/default/files/documents/Dkt%20260%2C%20Order%20RE%20Privilege%20of%20Jan.%204-7%2C%202021%20Documents_0.pdf).

184. *Id.* at *27 ("Dr. Eastman and President Trump launched a campaign to overturn a democratic election, an action unprecedented in American History. Their campaign was not confined to the ivory tower—it was a coup in search of a legal theory. . . . [T]his case is a warning about the dangers of 'legal theories' gone wrong, the powerful abusing public platforms, and desperation to win at all costs. If Dr. Eastman and President Trump's plan had worked, it would have permanently ended the peaceful transition of power, undermining American democracy and the Constitution. If the country does not commit to investigating and pursuing accountability for those responsible, the Court fears January 6 will repeat itself.").

185. *Id.* at *24.

and out), loyalty, and even the objectives of the representation. The objectives of the representation cannot be advice or assistance that would be an abuse of the office or government power. Further, such an understanding will forestall the ability of government officials who are not getting the advice or assistance they wish from government lawyers to attempt to obtain that advice or assistance from private attorneys. Again, Trump is an example. The DOJ largely refused to help him in overturning the election and overarchingly advised him that the election was fair and that he had lost. But Trump had also hired private attorneys to advise him and assist him in how to overturn the election—including in how prospectively to use the power of the offices of President and Vice President to do so.

While it is beyond the scope of this Article to engage in a full exploration of what rules could or should be made for government lawyers or private lawyers representing government officials as to the prospective use of government power, the point here is that the First Amendment is not a roadblock to regulation commensurate with the role of the attorney in the system of justice and the core duties owed to clients. Because both private lawyers advising government officers as to the prospective use of their powers, as well as actual government lawyers, owe loyalty to the government, both can be subject to regulations that would require reporting up and/or out as to abuse of government power and offices, exceptions to confidentiality, and mandatory or noisy withdrawals.

Importantly, the current Model Rules of Professional Conduct give very little guidance to government attorneys (other than prosecutors) or to private lawyers advising government officials. Despite the language in Comment 9 to Model Rule 1.13 indicating that confidentiality norms may be less stringent when "public business is involved,"[186] the actual rule on confidentiality in Model Rule 1.6(b) does not provide an exception to confidentiality that would readily and expressly allow for disclosure of abuse of government power or offices.[187] The failure to provide an express exception to confidentiality for such abuse leaves lawyers who represent government officials bereft of the assurance that they even can breach confidentiality without subjecting themselves to potential discipline. Further, the lack of such an exception has implications for other rules. For

186. MODEL RULES OF PRO. CONDUCT r. 1.13, cmt. 9 (AM. BAR ASS'N 2020).
187. *See id.* r. 1.6(b).

example, Rule 4.1 requires lawyers to disclose material facts when "necessary to avoid assisting a criminal or fraudulent act by a client"—but this required disclosure is only triggered if there is an exception to confidentiality under Model Rule 1.6.[188] Thus, if there is no exception to confidentiality under Model Rule 1.6, then the lawyer is not required by Model Rule 4.1 to disclose material facts to avoid assisting a client fraud. In other words, because there is not an exception to confidentiality in Model Rule 1.6 for abuse of government power or office, lawyers also avoid any disclosure obligation under Rule 4.1.

The Model Rules should be amended to clarify the duties of government and private lawyers when acting in an advisory or assistance role to government officials. Additionally, the Model Rules should include an exception to the duty of confidentiality for client abuse of government power or office—so that lawyers have the option to disclose governmental malfeasance despite the duty of confidentiality, and in some scenarios even be required to make disclosures to avoid assisting in the abuse along the lines of Rule 4.1. Although the precise contours of such rules are beyond the scope of this Article, as shown by the fallout of the 2020 election, the integrity and stability of our constitutional system of government apparently depends to a significant degree upon lawyers in government service or who advise and assist government officials. As a profession, we can and should work to clarify and shore up the duties of such lawyers in relation to protecting constitutional governance.[189]

188. *See id.* r. 4.1(b).

189. It is also important for law schools to offer more instruction to students about the duties of lawyers employed by or advising government. Susan Saab Fortney contributed an article to this symposium addressing that need. *See* Susan Saab Fortney, *Ethical Quagmires for Government Lawyers: Lessons for Legal Education*, 69 WASH. U. J.L. & POL'Y 17 (2022).

CONCLUSION

A proper understanding of the First Amendment rights of lawyers is attuned to the lawyer's role in the system of justice, and, consequently, protects that system. Courts do not need to discard lawyer First Amendment rights in order to prohibit or punish lawyers who are using their licenses to undermine constitutional governance. Indeed, it would be detrimental to the system of justice if lawyers did not enjoy the protections of the First Amendment in their association with clients, advice, advocacy, and petitioning. Nevertheless, as exemplified in the many contexts fleshed out by Trump's Big Lie and attempts to overturn the 2020 election, lawyers can and should be punished when they use their licenses to defraud the people or undermine constitutional governance.

The central ideal of our constitutional government is that political power is ultimately vested in the people—and that "We, the People of the United States" had and have the collective power to create the government. When a government official tries to wrest that power from the people by making an autocratic bid to stay in power contrary to the will of the people as determined by an election, that official is undermining our basic governmental foundation and should not be able to employ the aid of attorneys (who are delegates of state power derived from the people) to advise or assist in such activity. While a decent contingent of lawyers recognized this fact and resigned or withdrew rather than assist Trump in overturning the election, another contingent was willing to come to his aid both publicly and privately—and even advise him in how to commandeer the governmental power bestowed upon his office (and the office of the Vice President) to his personal ends. The First Amendment does not protect from discipline lawyers who use their association, advice, and advocacy to undermine our constitutional system of government.